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LAND TAX.

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SECTION 1.—NATURE AND HISTORY.

1. Land Tax, or Cess, is now a permanent tax of fixed amount, levied annually on the land rent of counties in Scotland, but subject to redemption.[1] Burghs used to contribute as well as counties, but they have now been relieved of the burden.[2]

2. Land tax is the oldest method of taxation, though it must not be supposed that, when first instituted, it was an annual or regular payment. In the earliest times of which we have any historical record "the ordinary source of the royal revenue may be described generally as consisting of the rents of Crown lands, with the payments due from the thanages, the casualties of ward, marriage, relief, and non-entry exigible from time to time from the Crown vassals, the fines imposed by the Justiciary and Sheriffs, the estates of attainted persons, the fermes or maills of royal burghs, and the customs on merchandise, with occasional compositions for letters of gift, remissions, and legitimations, and the castle wards—that is, certain dues payable by lands in the vicinity of some of the royal castles for the expense of upholding them. Taxes were an extraordinary source of income, to which the King was not expected to have recourse except on the occurrence of great national emergencies." [3] But these taxes, as they happened to be required, were levied on the land in varying proportions, and were the origin of the cess, which has been annually levied on land for more than two hundred years. For a considerable time before 1587, when the Church lands were annexed by the Crown, the taxes had been imposed in the proportion of one-half on the Church, one-third on the freeholders, and one-sixth on the burghs. Subsequent to the annexation of the Church lands, the counties continued to pay their former share, the balance falling on the rest of the kingdom.

3. The incidence of the tax on individual lands was settled by the ancient valuations contained in the Old and New Extent (see EXTENT,

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GENERAL AUTHORITY.—Rankine on Land Ownership, 4th ed., pp. 219, 834 *et seq.*

[1] 38 Geo. III. c. 5 and c. 60; 42 Geo. III. c. 116.

[2] 59 & 60 Vict. c. 37, s. 4 (1).

[3] Preface by Dr. Stuart and Mr. G. Burnett to vol. i. of The Exchequer Rolls of Scotland, 1878, p. xxxiv.

Old and New) and Bagimont's Roll. The latter was the rent-roll of Scottish ecclesiastical benefices, made up in 1275 by Baiamundus de Vicci, who came from Rome to collect one-tenth of the benefices for the relief of the Holy Land.[1] It seems to have been used, for some eighty years after the Reformation, as the basis of valuation of Church lands, which had now become temporal lordships. These lands had never been extended, nor had the lands held feu of the Crown, which were valued at the feu-duty reserved. The whole system was full of anomaly and confusion, but no attempt was made to obtain a new valuation until the time of Charles I. A system of valued rent was then instituted in 1643,[2] which, though abandoned in 1666, in favour of the Old Extent, was finally adopted in 1667.[3] Under this system taxes were levied not "as the taxations have been or by the divisions of temporalities or spiritualities," but "promiscuously," and "a particular roll" was ordered "to be made up by commissioners, of the just and true worth of every person or persons, their present year's rent of this crop and year 1643 to landward as well of land and teinds as of any other thing whereby yearly profit and commodity ariseth."[4] Each burgh and sheriffdom was made liable for a certain sum, apportionable in the former by the magistrates, in the latter by commissioners. The rolls then made up are not now in existence, but the results of them were carried to the cess books, and became the sole rule for taxation.

4. From this time until the Union the land tax gradually came to be regarded as a regular institution, until in the Act of Union it was practically recognised as an annual tax. The proportion payable by Scotland was fixed at £48,000 (about a fortieth of the English contribution). The tax was levied on this principle, under Annual Supply Acts, during nearly the whole of the eighteenth century. In 1798 Pitt introduced a scheme, which took final shape in 1802,[5] giving landowners the power of redeeming their land tax. Scotland's contribution was then finally fixed at £47,954, 1s. 2d., and remained at that figure until the abolition of the land tax in burghs.[6]

Section 2.—Mode of Collection.

5. The collection was formerly in the hands of the Commissioners of Supply in counties, and magistrates in burghs, but is now intrusted to officials appointed by the Treasury, who take the risk of defalcations on the part of their collectors.[7] The tax is recovered by poinding and sale.[8] Although it attaches to the land, it is not a *debitum fundi*.[9] The owner of the land for the time being is liable for the tax as it falls due, but arrears do not affect singular successors.[10] As may be readily supposed, in the case of a tax which is levied in accordance with valuations made two centuries ago, the alterations in the value of property during that time have given rise to many inequalities. But the total sum payable by Scotland is now so comparatively insignificant that these would appear to be regarded rather as an interesting relic of a bygone time than as a serious hardship.

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[1] Innes, Scotch Legal Antiquities, p. 190.

[2] Thomson's Acts, vi. pt. i., p. 26.

[3] *Ibid.*, vii. 539.

[4] *Ibid.*, vi. pt. i., p. 30, col. 2.

[5] 42 Geo. III. c. 116.

[6] 59 & 60 Vict., c. 37.

[7] Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 81.

[8] *Ibid.*, s. 97; *Renfrew* v. *Mags. of Glasgow*, 1861, 23 D. 505.

[9] *Graham* v. *Heritors of Clackmannan*, 1664, Mor. 10164.

[10] Bell, Com. i. 739.

SECTION 3.—THE TAX IN COUNTIES.

6. The land tax is now paid entirely by the counties. It is allocated by the Commissioners of Supply on the proprietors of land, and subjects connected therewith which yield annual revenue.[1] The actual collection, as mentioned above, is now in the hands of officials appointed by the Treasury. The commissioners cannot be compelled to supply to the collector an assessment roll of the land tax, setting forth the names of the different proprietors liable to assessment and their owners, and the amount payable in each case, as there is no such duty imposed on them by statute, and they have no power to tamper with the cess books.[2] In the case of lands which have been divided, they have still power to assent to an agreement between the parties as to the allocation among the several parcels of land of the cumulo amount of tax due in respect of the whole, but any dispute is now finally determined by the Sheriff, whose determination is recorded in the Sheriff Court Books, and forms the rule of payment subsequent to its date.[3]

7. The amount assessed in any year in any county on account of the unredeemed quota of land tax charged against it is now restricted to one shilling in the pound on the annual value of the land therein, any pence being remitted. If the quota would require an assessment of less than one penny per pound of valuation, it is made at the penny rate, except where this would produce a sum exceeding what would be required for the redemption of the whole unredeemed quota, in which case the assessment is restricted to such rate as would produce a net sum equal to that amount. An owner who has been totally exempted from payment of income tax by reason of his income not exceeding £160 is not liable—and if his income does not exceed £400 one-half of the tax is remitted.

SECTION 4.—THE TAX IN BURGHS.

8. As has been stated above, land tax in burghs was done away with by the Act of 1896.[4] The amount payable by each burgh was fixed, as in the case of counties, by the Act of 1798,[5] which continued any usage then existing as to the incidence of the tax, until altered by the burghs themselves. The cess was imposed, by usage dating back to the sixteenth century, not only on the rents of heritable subjects, but also, under the name of trade-stent, on trade profits and personal estate. This latter part of the tax was properly a part of the land tax, payable to the Crown, and as such leviable directly by the Crown on the inhabitants—not the magistrates—of burghs, and payment was enforceable by diligence.[1] The incidence of the whole tax on individuals was settled by the magistrates, assisted by stent-masters. Latterly the proportion allocated to heritage was fixed according to the value appearing in the annual valuation roll, there being no valued rent as in counties.[2]

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[1] 38 Geo. III. c. 5, s. 131; 52 & 53 Vict. c. 50, ss. 12 (2), 102.

[2] *Lord Advocate* v. *Commrs. of Supply for the County of Edinburgh*, 1861, 23 D. 933; affd. 1861, 4 Macq. 387.

[3] 52 & 53 Vict. c. 50, s. 102.

[4] 59 & 60 Vict. c. 37.

[5] 38 Geo. III. c. 5, s. 128.

Section 5.—Redemption.

9. The Act of 1802[3] made it possible for any owner of land to redeem his tax. The power has been taken advantage of to the extent that about one-third of the whole amount fixed by the Act as Scotland's quota has been redeemed. Application has to be made to the Commissioners of Supply to adjust the amount of tax payable in respect of the lands, for which it is proposed to purchase exemption. The Commissioners of Redemption (now the Commissioners of the Treasury)[4] then bargain with the landowner for the sale. Powers were given to heirs of entail to sell or burden part of the estate for the purpose of redeeming the tax.[5] And under the Lands Clauses Act[6] heirs of entail, or other persons with only a qualified interest in lands, were permitted to use the proceeds of a compulsory sale for redemption of land tax.

10. Opinions were expressed in the case of *Renfrew*[7] that the then existing Redemption Acts did not apply to burghs. But an Act passed shortly afterwards[8] provided that in the case of any burghs whose assessment produced a surplus over and above their proper quota of land tax, such surplus was to be used for the gradual extinction of their tax. When it was proposed in 1896 to free the burghs entirely from the tax, it was found that in several instances—notably Dumfries—some proportion of the tax had by this means been redeemed. To meet such cases the Act of 1896[9] provided for repayment annually to any burgh of a sum "equal to the annual amount of the land tax redeemed by such burgh."

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[1] 52 Geo. III. c. 95; *Renfrew* v. *Mags. of Glasgow*, 1861, 23 D. 505.

[2] 17 & 18 Vict. c. 91, s. 33.

[3] 42 Geo. III. c. 116.

[4] 1 & 2 Vict. c. 58, s. 1.

[5] 42 Geo. III. c. 116, ss. 61–66, 101, 102.

[6] 8 Vict. c. 19, s. 67.

[7] *Renfrew* v. *Mags. of Glasgow*, *supra.*

[8] 24 & 25 Vict. c. 91, s. 40.

[9] 59 & 60 Vict. c. 37, s. 4 (1).

LAND VALUES DUTIES.

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SECTION 1.—GENERAL.

11. The Finance Act, 1910,[1] imposed certain duties on land values, viz.: (1) increment value duty (ss. 1 to 12); (2) reversion duty (ss. 13 to 15); (3) undeveloped land duty (ss. 16 to 19); (4) mineral rights duty (ss. 20 to 24). The Finance Act, 1920,[2] repealed all these duties except the mineral rights duty.

SECTION 2.—MINERAL RIGHTS DUTY.

SUBSECTION (1).—*Incidence of Duty.*

12. The existing statutory provisions as to this duty are contained in ss. 20, 21, and 24 of the Finance Act, 1910. A duty of one shilling is levied per twenty shillings of the rental value of (1) all rights to work minerals, and (2) all mineral wayleaves (s. 20 (1)). The rental value is (*a*) where the right to work minerals is the subject of a mining lease, the rent paid by the working lessee in the last working year in respect of that right; (*b*) where minerals are being worked by the proprietor, the amount which is determined by the Commissioners of Inland Revenue to be the sum which would have been received as rent by the proprietor in the last working year, if the right to work the minerals had been leased to a working lessee for a term, at a rent and under the conditions customary in the district, and if the minerals had been worked to the same extent and in the same manner as the proprietor had worked them in that year; a copy of the Commissioners' valuation of the rent is to be served on the proprietor; (*c*) in the case of a mineral wayleave, the rent paid by the working lessee in the last working year.

13. The duty is not payable where the rent was paid really in respect of a right to let down the surface belonging to the lessor.[3] Where income tax has been deducted by the lessee before paying the rent, the duty is payable only upon the actual rent paid.[1] The duty is payable upon arrears of rent.[2] In order to arrive at the rental value a lessor is not entitled to deduct super-tax from rent received by him.[2] The duty is payable where the wayleave relates to the carriage, over his lands, of minerals not belonging to the lessor.[3] If the Commissioners are satisfied that the working lessee's rent is larger than is customary in the district, and partly represents a return for expenditure by the proprietor which would ordinarily have been borne by the lessee, they are to substitute such rent as they may determine to be the customary rent in the district, if the lessee had borne the expenditure (s. 20 (2)). Where the circumstances of a district are such that, in the opinion of the Commissioners, it is impracticable to fix any sum which satisfactorily represents a rent customary in the district, then the rent which would be paid, under similar circumstances and ordinary conditions, elsewhere than in the district, is to be substituted for the rent customary in the district (s. 24).

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[1] 10 Edw. VII. c. 8, Part I.

[2] 10 & 11 Geo. V. c. 18, s. 57 (5).

[3] *Inland Revenue* v. *Joicey*, [1913] 2 K.B. 580.

SUBSECTION (2).—*Returns.*

14. Proprietors of minerals, and every person to whom any rent is paid in respect of a right to work minerals, or of a mineral wayleave, are to make returns, on notice being given by the Commissioners, giving (1) the amount received in respect of the right or wayleave, and (2) where the proprietor is working the minerals, particulars as to the minerals worked (s. 20 (3)).

SUBSECTION (3).—*Assessment.*

15. The duty is assessed by the Commissioners, and is payable after 1st January in the year for which duty is chargeable. It is recoverable as a debt due to the Crown from the proprietor, where he is working the minerals, and, in any other case, from the immediate lessor of the working lessee. As between the immediate lessor and the working lessee, the duty is borne by the former, notwithstanding any contract to the contrary (s. 20 (5)).

16. The duty is not chargeable in respect of common clay, common brick clay, common brick earth, or sand, chalk, limestone, or gravel (s. 20 (5)). It has been held that all substances obtained from the crust of the earth, other than surface soil, by mining, quarrying, or open working, are minerals in the sense of the Act, with the exception of those substances expressly excepted therein, and that, accordingly, felsite whinstone and granite, not being so excepted, are minerals and subject to the duty.[4] Brine has also been held to be a mineral within the meaning of the Act, and duty held to be payable on the rental value of the right to work it.[1]

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[1] *Marquess of Anglesey* v. *Inland Revenue,* [1913] 3 K.B. 48.
[2] *Duke of Beaufort* v. *Inland Revenue,* [1913] 3 K.B. 48.
[3] *Storey* v. *Inland Revenue,* [1914] 1 K.B. 87.
[4] *Anstruther's Trs.* v. *Inland Revenue,* 1912 S.C. 1165.

SUBSECTION (4).—*Deduction of Duty as between Lessees.*

17. An immediate lessor who pays the duty, and who is himself a lessee, may deduct from the rent paid by him a sum equal to the duty. A similar deduction may be made from rent paid by any person from whose rent such a deduction is made (s. 20 (1)). Any contract for the payment of rent without allowing such a deduction is void, and any person making a deduction is discharged from the payment of rent equal to the amount deducted. Persons refusing to allow deductions are liable to a penalty, not exceeding £50, recoverable in the Court of Session (s. 21 (3) and s. 42 (1)). Where the duty has been charged on a substituted rental value, the Commissioners, on the application of the lessor from whose rent deduction has been made, may, if they think fit, make a corresponding substitution as regards that rent (s. 21 (4)).

SUBSECTION (5).—*Definitions.*

18. "Proprietor" means the person for the time being entitled in possession to the minerals, or to the rents and profits thereof, or to any part of them. "Rent" means yearly or other rent, and includes any fine, premium, or forfeit, and any payment, consideration, or benefit in the nature thereof. Where rent is paid or rendered otherwise than in money, or money's worth, the amount thereof is the sum which the Commissioners consider to be its value. "Mining lease" means a lease for mining purposes, *i.e.* searching for, winning, working, getting, making merchantable, carrying away or disposing of, mines or minerals, or purposes connected therewith; it includes an agreement for such a lease, or any tenancy or licence, whether by deed, parole, or otherwise, for mining purposes. "Lessor" and "lessee" include licensor and licensee, sub-lessor and sub-lessee, and the heirs, executors, administrators, and assigns of a lessor and lessee respectively (s. 42 (3)). "Working lessee" means the lessee who is actually working the minerals, or who would have the right actually to work them if they were worked, and the lessee who is in actual enjoyment of a mineral wayleave. "Working year" means the year ending 30th September, or such other day as the Commissioners may approve. "Last working year" means the year completed immediately before 1st January in any financial year for which duty is paid. "Mineral wayleave" means any wayleave, airleave, waterleave, or right to use a shaft, granted to or enjoyed by a working lessee, whether above or under ground, for the purpose of access to, or the conveyance of, the minerals,[2] or the ventilation or drainage of the mine, or otherwise in connection with the working of minerals.

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[1] *Attorney-General* v. *Salt Union*, [1917] 2 K.B. 488.

[2] See *Storey* v. *Inland Revenue*, [1914] 1 K.B. 87.

All the minerals which are being worked by the proprietor, or which the lessee has power to work, and which would, in the ordinary course of events, be worked by the same colliery, mine, quarry, or open working, are to be deemed to be minerals which are being worked at that date. Minerals which are being won for the purpose of being immediately worked, are to be deemed to be minerals which are being worked. Minerals are to be held as comprised in a mining lease if the right to work minerals is the subject of a mining lease, or if the minerals are being worked under the terms of such a lease, although the lease has expired (s. 24).

Section 3.—Appeals.

19. Any person aggrieved may appeal, within such time and in such manner as may be provided by rules made by the Reference Committee, against the amount of any assessment of duty, or against a refusal of the Commissioners to make any allowance, or to make the allowance claimed, or against any apportionment of duty; or against the determination by the Commissioners of any other matter in terms of the Act. Appeals are to be referred to such a one of a panel of referees, appointed under the Act, as may be selected in the manner provided by rules to be made by the Reference Committee.[1] The Committee consists of the Lord President of the Court of Session, the Lord Justice-Clerk, and the Chairman of the Scottish Committee of the Surveyors' Institution (s. 33 (5)). The panel consists of referees who must be Fellows of the Surveyors' Institution, or other persons having experience in the valuation of land, including persons having experience in the valuation of minerals. The decision of the referee is final, subject to appeal to the Court of Session. The referee is to determine matters referred to him in consultation with the Commissioners and the appellant, or any persons nominated by the Commissioners and the appellant for this purpose. The referee may make an award of expenses as between the Commissioners and the appellant, and any order of the referee as to expenses is enforceable as a recorded decree-arbitral (s. 33 (3) and s. 42 (2)).

20. Appeal is allowed from the referee to the Court of Session (Valuation Appeal Court), subject to regulations prescribed by Act of Sederunt,[2] including conditions enabling the Court to require the payment, or giving of security, for any duty claimed. In England it has been held that the Commissioners have the right of appeal.[3] Appeal is by way of stated case, and subs. 2, 3, and 4 of s. 10 of the Finance Act, 1894,[4] apply with reference to such appeals. Appeals may also be taken from the Valuation Appeal Court to the House of Lords (s. 33 (4) and s. 42).

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[1] S.R. & O., 24th April 1911, No. 433/S. 44.

[2] C.A.S., J, ii.

[3] *Inland Revenue* v. *Joicey*, [1913] 1 K.B. 445.

[4] 57 & 58 Vict. c. 30.

LANDLORD AND TENANT.

See LEASE.

LANDS CLAUSES ACTS.

See COMPULSORY PURCHASE.

LANDS VALUATION APPEAL COURT.

See VALUATION AND RATING.

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LAW.

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SECTION 1.—GENERAL.

21. It is not within the province of this article to engage in an elaborate inquiry into the history and development of the Science of Law. For such matters the reader is referred to the general literature of the subject.

22. Two factors have contributed largely to prevent progress in scientific methods of thought in regard to law—one of these is the confusion of law with morality, the other what may be termed the insularity of particular legal systems. From the moment that men begin to organise in communities it is apparent that there arises, in ever-increasing degree as the social order develops, a conflict between the rights and interests of the individual on the one hand and the community of which he is a unit on the other. The activities of the State tend to be directed towards the control, if not the curtailment, of the complete freedom of action of the individual in what is conceived to be the interest of the community at large. Whether or not the greatest good of the greatest number is the highest political ideal, to test the value of legal rules by reference to such an objective is to lose sight of the distinction between law and morality, and indeed to identify the science of law with that of ethics. It is the function of the law, for example, to define the subject-matter and limits of ownership, to give validity to business engagements, and to provide the rules whereby the family is constituted and the resultant rights and duties of parent and child, husband and wife, are ascertained. That having been done, however, it is apparent that within the various regions thus marked out there is room for action which the law cannot control. A man may comply with all the requirements of the law and yet, for example, fall far short of being a good husband or father. Accordingly we find that such words as "right," "duty," "crime" are habitually used in a moral rather than in a legal sense; the reason being that the test in the former is, not the act alone, but the motive, the thought, and feeling which prompts it, whereas in the latter it is the act which must be looked to, and not the motive, except in so far as may be necessary to explain the real character of the objective fact.[1]

23. The second factor referred to is the natural result of the conditions of life. It is apparent that the special features characterising the life of any community will result in the growth of a mass of customs and usages peculiar to itself and reflecting in marked degree national tendencies and characteristics. The more definite these are the more likely is it that they will present differences from those prevailing in other communities, particularly when, owing either to political animosities or to physical barriers, intercourse is interrupted or difficult. The result may be the growth in a particular community of a body of law on which foreign thought has had little or no influence; which is isolated and resents any attempt at modification through the introduction of the alien element. A striking example of this may be found in the jealousy with which at one time the English Courts viewed the introduction of the Civil Law into the province of the Common Law, which was regarded, not by judges alone, as "the perfection of human reasoning." The sheer necessities of the altered situation brought about by the improved means of travel and intercourse between States have broken down this obstacle, and the development of International Law, both public and private, is itself evidence of the progress in the study of law as a science.

SECTION 2.—DEFINITION.

24. "Law" as it is used in the title of this publication means the sum of the principles and rules which ought to be observed by parties in the determination of their rights and duties if these are to come into effect in Scotland. While the philosopher and the reformer may each regard the law from a different standpoint, the judge, the practitioner in the conduct of his clients' affairs, and the party to an action or transaction must all regard the law as contained in a statute, an authoritative decision, or an undoubted custom, as final and conclusive in relation to the matter with which they are dealing. The laws of Scotland, accordingly, are those rules and principles which the Scottish Courts, if resorted to, are presumed to apply and enforce.

SECTION 3.—SOURCES OF LAW.

SUBSECTION (1).—*Custom.*

25. In primitive social organisations, and even in more advanced types of civilisation, when the central authority is still imperfectly developed, it is difficult to trace laws in the sense of rules promulgated, or adopted, and enforced by a sovereign power. The existence of a social order postulates, of course, the existence of some rules, for without these society could not exist. These are generally designated customs, and the law founded on them is customary law—the *jus moribus constitutum* of the Romans.

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[1] *Sorrell* v. *Smith*, [1925] A.C. 700.

26. It is not every custom, however, that is, or has the force of, law. Proof of what generally happens is not necessarily proof of custom. Further, the mere existence of a custom may not be sufficient to establish its legality. Regard must be paid to its nature, to the relation subsisting between those who benefit from and those who are handicapped by it, to the position and power of one party to enforce and the capacity of the other effectually to resist, in determining whether the custom alleged is the outcome of a social *consensus* or merely something in the nature of an impost. To be recognised as law a custom should not only be proved to exist; it should also be shewn to be either in itself honest and reasonable, consistent with the accepted principles of justice, or to be so plainly the outcome of the consent of the local community that there is an absolute presumption that, having regard to local circumstances, it originated from just principles. Further, a distinction must be observed between the mere recurrence of instances of dealing, many of which may have had their origin in contract, and a settled practice amounting to the acceptance of a binding obligation of a custom apart from a particular bargain.[1] See CUSTOM AND USAGE.[2]

SUBSECTION (2).—*The Common Law.*

27. The common law, in the modern Scottish sense of the term, is the body of customs thus defined and ascertained. It is derived from various services written and unwritten; ancient usages; the Roman law, civil and canon; feudal customs; and also the usages of other States. All of these receive their sanction either by incorporation in the enactments of the legislature or more largely through the medium of decisions of the Courts.

28. At an early stage of Scottish history the term common law was apparently sometimes used as designating only the Roman law—either the civil law by itself or in conjunction with the canon law. Thus in the Statute 1585, c. 18, provision is made for the guardianship of imbecile and insane persons by the *agnati* of the civil law "according to the disposition of the commoun law"; and the recognition of the Roman law as the common law for Scotland, in contradistinction to the statute law, seems to be expressed also in the Acts 1540, c. 80; and 1551, c. 22. Stair, however, did not accept the view that even the Roman civil law was acknowledged "as a law binding for its authority,"[3] an opinion in which Erskine, while recognising the occasional use in the statutes of the term common law as meaning the civil law, substantially agrees.[1] The civil law of Rome was, however, in the opinion of both of these writers one of the main sources of Scottish legal principle and practice, and it is still as it was in Erskine's day "of great weight in all cases not fixed by statute or custom, and in which the genius of our law will suffer us to apply it."[2]

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[1] "*Strathlorne*" *S.S. Co.* v. *Baird & Sons*, 1916 S.C. (H.L.) 134, per Lord Shaw of Dunfermline.

[2] Vol. V. p. 354, *ante*.

[3] Inst. i. 1, 12, 16.

SUBSECTION (3).—*Equity.*

29. The distinction between common law and equity familiar to students of English legal history and, until comparatively recently, in force in that country, is not known in Scottish theory or practice.[3] Our institutional writers expressly found custom and customary law on equity. Thus Stair, speaking of our customs, says "they have arisen mainly from equity";[4] and in more recent times Professor Lorimer states as the groundwork of our legal arrangements "the customs which spring from the notions of right and wrong of a rude and simple community."[5] In consonance with these views our Courts, superior and inferior, administer law and equity together, and it may be assumed that, where the two words are found in conjunction, whether in statutes or opinions, the intention is to identify, not to contrast, the ideas which they connote. See EQUITY.[5]

SUBSECTION (4).—*Enactment.*

30. Legislation is law made in statutory form by a body duly invested with that definite function. Law so made is not dependent for its authority or obligatory force upon accepted and generally recognised principles of justice or reason. The observation that the legislature "has even the power to do what is wrong and we are bound to obey it"[6] expresses the truth that statutes derive their authority not from the inherent justice or reasonableness of their provisions but from the authority of the enacting body. Incidentally it is an interesting use of the word "wrong" by a judge.[7] Statute law has this important characteristic, that the express words used in the enactment are essential to the law so made. In highly developed states of society legislation tends more and more to become the chief source of law, many of the details being found in rules and by-laws made by subordinate authorities in virtue of the powers to that end delegated to them by the central authority.

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[1] Inst. i. 1, 28, 41.

[2] *Ibid.*, 41.

[3] See Mackay, Manual of Practice, p. 81, s. 13.

[4] Handbook, s. 1; Kames, Principles of Equity, vol. i. pp. 7, 27, 30.

[5] Vol. VI. p. 258, *ante.*

[6] *M'Laren* v. *Menzies*, 1876, 3 R. 1151, per Lord Neaves at p. 1159.

[7] See para. 22, *supra.*

SUBSECTION (5).—*Decisions.*

31. Strictly speaking judges do not make law—they interpret and apply existing law. In the act of so doing, however, they are, from the very necessities of the case, compelled in fact, if not in form, to make law. Sir H. Maine[1] suggests that the earliest conception of a law was a generalisation from the decisions pronounced by a judge. Erskine, referring to a uniform series of decisions of the Court of Session,[2] says "that great weight is to be laid on their later decisions where they continue for a reasonable time uniform upon points that appear doubtful: but they have no proper authority in similar cases." He applies the same doctrine to judgments of the House of Lords and concludes: "Where a similar judgment is repeated in this Court of the last resort, it ought to have the strongest influence on the determination of inferior Courts."

32. In England the practice of quoting previous decisions of the Courts as authority for the common law goes back to very early times, probably because these decisions were regarded as the best evidence of what the law was. Blackstone, indeed, says:[3] "These judicial decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law." Erskine thus appears to treat decisions as proving a custom of the Court, Blackstone as proving a custom of the country.

33. The authority of judicial decisions, in modern practice, is not so uncertain as Erskine states, nor quite so unqualified as Blackstone appears to have regarded it. Strictly speaking, the only part of a judgment which is law is the decree, and that is the law only for the parties to the action and of the question submitted for decision. Regarded as a precedent the decree can at most govern the decision of a subsequent case in which the facts are identical. The power which a judge has of distinguishing one case from another by a careful balancing of the facts and an estimate of the weight to be attached to any particular fact is a valuable, and not uncommon, method of reaching a different conclusion when the precedent pleaded does not commend itself as just.

34. The opinions delivered by judges in pronouncing decree are, if the facts of the case as well as the nature and extent of the arguments submitted are known, valuable as expounding the general principles of the law and explaining their application to the particular facts in issue. They are not, however, to be interpreted as are the precise words of a statute, the *ipsissima verba* of which are, as already stated,[4] of the essence of the law. Viscount Dunedin in a recent case[5] stated the law as to the relationship of decree and opinion as follows: "Now when any tribunal is bound by the judgment of another Court, either superior or co-ordinate, it is of course bound by the judgment itself. And if from the opinion delivered it is clear—as is the case in most instances—what the *ratio decidendi* was which led to the judgment, then that *ratio decidendi* is also binding." After considering the position of the judgment under consideration and stating his own conclusion he proceeded: "That, however, is far from wiping *Wear* v. *Adamson* off the slate. It remains for two purposes. First for the judgment itself, and, second, for the opinions of the noble Lords, which are entitled to the greatest respect. Now the judgment is binding. What, therefore, I think is our duty on this occasion is to consider the statute for ourselves in the light of the opinions, diverging as they are, and to give an interpretation; but that interpretation must necessarily be one which would not, if it was applied to the facts of *Wear* v. *Adamson*, lead to a different result." Expressions of opinion which are *obiter* are not binding.

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[1] Ancient Law, pp. 4, 5.

[2] i. 1, 47.

[3] Com. i. 68.

[4] Para. 30, *supra.*

[5] *Great Western Rly. Co.* v. *Owners of S.S.* "*Mostyn,*" [1928] A.C. 57, at p. 73.

35. Decisions of the Supreme Courts are, if in point, treated as absolutely binding on the judges of inferior Courts. If two decisions are contradictory, that pronounced by the higher Court prevails. If the Court which has pronounced them is the same, or if they have been given by Courts of equal authority, the later in date is preferred. In the Inner House of the Court of Session conflicting judgments of the Divisions, or a doubt as to the soundness of a previous judgment in the same Division, may be resolved by referring the question to a Court of seven judges or to the whole Court. Decisions of the English Courts, and particularly of the House of Lords in English cases, are treated with respect in the Scots Courts, but the weight to be attached to them varies according as there is or is not a Scots decision on the same point and also with the existence of points of dissimilarity between the laws of the two countries. It is obviously desirable that there should be uniformity on such questions as domicile, mercantile law, and the construction of statutes applicable to the United Kingdom, and also, so far as not rendered impossible by technicalities of municipal law, as, for example, in the realm of conveyancing, in the construction of deeds and testamentary writings. On these and kindred matters the Courts of one country do pay great regard to the decisions of those of the other.

36. It is clear from these considerations, particularly those which relate to the statements of the ground of judgments, that the authority attaching to judicial precedents postulates a certain power on the part of the judges to make new law. The view prevailing prior to the time of Bentham and Austin that judges merely declared existing law is no longer tenable. Not only does a judge create a precedent when he adjudicates upon a new point or a novel question, but the exposition of the *rationes decidendi* expanded and developed in later cases leads naturally to the enunciation of new principles or the modification of old ones, and in turn to the formulation of new rules; and so law is made. Indeed in Scotland the Courts have on occasions deliberately made law by a single decision, as in *The Ministers of the Parish of Tingwall*

v. *The Heritors*,[1] where it was laid down "as a general rule to be observed in all time coming" that a parish church must be built on a certain scale.

SECTION 4.—REGIAM MAJESTATEM.

37. The Regiam Majestatem, so called from the opening words of the prologue, is a treatise on the laws of Scotland in four books, on the plan of Justinian's *Institutes*, purporting to have been made by the order of David I. of Scotland. Like all our older law books, this work was originally written in Latin, the earliest manuscripts now extant having been written about the end of the fourteenth century; but in 1609 there was published a translation by Sir John Skene of Curriehill, Clerk of the Register. The authenticity of the work has been the subject of a long and bitter controversy, in which every possible theory has been put forward and supported by one or other of the leading writers on Scots law. Craig and Stair reject the book entirely; Bankton believes it undoubtedly part of our law, but obsolete since an early date; Erskine believes it to be exactly what it purports, a compilation made by order of David I.; and Ross[2] believes it to be a genuine Scottish book, written about the time of William the Lion, grandson of David I.; while others (among whom may be mentioned Sir Walter Scott) consider it an attempt on the part of Edward I. of England to impose by guile the English law on Scotland. In the first volume of the Acts of Parliaments of Scotland, published by command of the Queen in 1844, Professor Cosmo Innes examines the question very carefully, and prints in parallel passages the Regiam Majestatem and Glanvil's treatise on the laws and customs of England (the Regiam Potestatem), written during the reign of Henry II. of England. From this it appears that almost the whole of the Regiam Majestatem is to be found in Glanvil's work, and almost in identical words. The prevailing opinion now is against the authenticity of the Regiam Majestatem.

38. By the Acts 1425, c. 54; 1487, c. 115; and 1633, c. 20, committees were directed to be appointed to examine *inter alia* the Regiam Majestatem and the Quoniam Attachimenta (another treatise bound up with the Regiam Majestatem in Skene's collection), in order to report on these and to suggest any needful alterations. No report seems to have been made by any of the committees, from which Erskine, though believing in the authenticity of the Regiam Majestatem, concludes "that none of these remains ought to be received as of proper authority in the Courts of Scotland. Nevertheless, they may be produced, not only for illustrating, but even in proof of our ancient customs. They are also of excellent use towards understanding the history and gradual progress of our law; and consequently may furnish a lawyer with proper arguments where statute law is silent and the more modern practice doubtful."[3] Even this modified use of the Regiam Majestatem has long been given up, and the interest possessed by the work is purely antiquarian. Those interested in such matters may consult, in addition to the authorities above quoted, those cited below.[1]

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[1] 1787, Mor. 7928.

[2] Lectures, ii. 60.

[3] Ersk. i. 1, 36.

SECTION 5.—POSITIVE LAW.

39. The division of law, as defined earlier in this article, has been the subject of much discussion and considerable divergence of view. The commonly accepted basis of division is that indicated by the terms Public Law and Private Law, a basis which has the recommendation of age, going back as it does to the *jus publicum* and *jus privatum* of the Romans. It points, also, the distinction between the regulation of rights and duties where, on the one hand, the State is involved as a party, and where, on the other hand, the only parties concerned are private individuals. The distinction, however, is one not always easy to maintain, and probably a more satisfactory classification is according to the classes of rights and duties involved. The latter has the advantage of being more closely identified with practice,[2] and taking it as a basis the following main heads of division are found.

SUBSECTION (1).—*Constitutional Law.*

40. This is concerned with the relations of the Government, and the subjects of the State and also with the relations of Crown, Executive, and Parliament *inter se.* It includes also the law of Parliament. See CONSTITUTIONAL LAW.[3]

SUBSECTION (2).—*Administrative Law.*

41. This is a term used by the Scottish Universities Commissioners, and borrowed from Continental usage. It may be held to include the great body of statutory law, dealing with police, burgh, county, and local government, poor, public health, education, and similar subjects. Perhaps the details of taxation, stamps, excise, and customs fall under this head.

SUBSECTION (3).—*Criminal Law.*

42. This deals with the powers of persons (official or private) to prosecute for crimes, and the powers of judges as to punishment. It aims at (*a*) respecting the freedom of the person before trial, consistently with securing his appearance thereat; (*b*) ensuring a fair trial, any excessive punishment being restrained by the right of appeal and in the last resort by the Royal clemency; (*c*) adequate prison regulations for the execution of the sentence. A penal law is one imposing punishment for an offence against the State; but it is not penal merely because it imposes an extraordinary liability on the delinquent in favour of the person wronged.[1]

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[1] Hailes, Annals, iii, 275; Scott, Border Antiquities; Thomson, Report on the Records.

[2] Ersk. i, 1, 28.

[3] Vol. IV. p. 416, *ante.*

SUBSECTION (4).—*Municipal Law.*

43. Under this head are included the rules governing the rights and obligations as to person and property of individuals. It includes in modern practice the laws as to marriage, husband and wife, parent and child, guardian and ward, trusts, succession, etc. Since the passing of the Act 20 & 21 Vict. c. 44, the Crown regularly appears in the Courts as a private litigant. Mercantile law, including the law merchant, or customary law of merchants, belongs to this division.[2] Erskine treats the customs of trading nations as part of the *jus gentium.*[3] As to the land laws and feudal law, see CHARTER (FEUDAL) and SUPERIOR AND VASSAL.

SUBSECTION (5).—*Ecclesiastical Law.*

44. This denotes either the quasi-statutory (Acts of Assembly) or common law of the Church itself within the limits of its constitution, or that branch of the municipal law which deals with ecclesiastical persons and property.[4]

SUBSECTION (6).—*Military Law.*

45. Military Law is a special code dealing with the duties and rights of soldiers as such in peace and in war, at home and abroad.[5] Martial Law, as distinguished from military law and the customs of war, is unknown to English jurisprudence.[6]

SUBSECTION (7).—*International Law.*

46. International Law may be regarded as an extension of all the preceding branches of law to cases where foreign States, or their subjects as representing such States, become involved.[7]

For the principles which are observed by the Courts of this country in exercising jurisdiction over the subjects of foreign States and in adjudicating upon disputes to which foreigners are parties reference is made to the article upon INTERNATIONAL PRIVATE LAW.[8]

SECTION 6.—CODIFICATION.

SUBSECTION (1).—*General*

47. The object of codification is to present the whole body of the law, whether statutory or not, in the form of a systematised arrangement setting out the general principles with such statement of detail as will so far as possible provide a rule for those circumstances which experience has shewn to be most common. In theory a code is a most desirable object; in practice it is most difficult to construct. As has been shewn, much of our law is embodied in the decisions of the Courts. It is consequently not easy to ascertain, not only on account of the difficulty of satisfactorily extracting and formulating the *rationes decidendi*, but also because of the labour involved in making certain that a later decision, which may alter the earlier in some important particular, has not been overlooked. Further, there is no certain test of the validity of a judicial precedent or precedents nor any assurance that they will stand the test of later and perhaps more critical examination. Statute law, on the other hand, has certain marked advantages both as to form and purpose. It is expressed in general terms, providing as it does a general rule. Further, as has already been remarked, the key to a statute is the grammatical sense of the precise words used; and when these are read in the light of the mischief which the statute was enacted to cure, or in the light of former statutes which it extends or controls,[1] the task of applying its provisions is, or ought to be, simplified. At the same time the complexities of modern life make the task of the legislator exceedingly hard, as is evidenced by the frequency with which the Courts are called upon to interpret statutes and the divisions of opinion which reveal themselves in regard to the scope and intention of an Act. The truth appears to be that the law of the Courts is more flexible, frequently indeed anticipating the changes in habits and thought of the country; whereas the law of the statute is on the whole easier to ascertain but less flexible, as it requires the action of the legislature, not always too happily directed, to alter it.

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[1] *Huntington* v. *Attrill*, [1893] A.C. 150.

[2] Bell, Com., Pref., p. xi.

[3] iii. 2, 24.

[4] See CHURCH, Vol. III. p. 314, *ante*.

[5] See ARMED FORCES OF THE CROWN, Vol. I. p. 481, *ante*.

[6] See Dicey, Law of the Constitution, p. 283; Manual of Military Law, pp. 4, 5.

[7] See INTERNATIONAL LAW, Vol. VIII. p. 365, *ante*.

[8] See Vol. VIII. p. 381, *ante*.

SUBSECTION (2).—*Codification in Scotland before the Union.*

48. By the Act of James I., 1425, c. 54, it was ordained "that sax wise men and discrete of ilke ane of the thre Estatis quhilk knawis the lawis best sall be chosen, sen (since) fraude and guile aucht to help na man, that sall see and examine the Buiks of Law, that is to say, Regiam Majestatem and Quoniam Attachiamenta, and mend the laws that need mendment." This was a proposal not of a code, but rather for the revision of the existing code of law, chiefly feudal, contained in the two law books mentioned, which Scotland had borrowed from Glanvill's *Tractatus de Legibus* and other law books of the twelfth century.

49. In 1469 the Parliament of James III. appointed a commission of four members of each Estate, by which "the King's laws *Regiam Majestatem*, *Quoniam Attachiamenta*, Actis, Statutis, and other bukis, were to be put into a (*i.e.* one) volume, and the laif (*i.e.* the rest) to be destroyit." This is an exact description of a code, though the drastic measure of destroying the older books of the law, often threatened, has never been carried out. John Leslie, Bishop of Ross, in the reign of Mary Stuart obtained a commission to "certain learned, wise, and expert men, who best knawis the lawis, to visyê, sycht, and correct the lawis of this Realm, sa that na uther but the said lawis, sychtit, mendit, and corrected be her said trusty counsalaris and commissionaris, or ony sax of them conjunctly, sal be by her privilege imprentit, or have any place, faith, or authoritie to be allegit and rehersit afore any of her jugis or justicis quhat somever." In 1574 the Regent Morton appointed a commission to "visite the bukis of the Law Actis of Parliament and Decisionis before the Session (*i.e.* Court of Session), and draw the form of the body our lawis quhair throu there may be a (*i.e.* one) certain written law to all our Soveraign Lordis Judgis and Ministeris of Law to judge and decide by." This was a project for a Scottish Code, with the reasons for desiring it clearly stated. It was the first of such projects which proposed to embody the decisions of the Court of Session. Charles I. issued a commission with the same object in 1628, which the Scottish Parliament approved in 1633, and a more ample commission was issued in 1649, of which Lord Fountainhall expressly says that it was in imitation of Justinian, who employed Tribonian and certain other lawyers to renew the books of the law in his time, and who compiled from them the *Corpus Juris* we now use.

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[1] *Public Tr.* v. *Wolf*, [1923] A.C. 544, at p. 553; *Viscountess Rhondda's Claim*, [1922] A.C. 339, at p. 365.

50. None of these commissions produced a code; and with regard to a later, and the last, Scottish commission in 1681, Fountainhall observes: "It may be useful if it takes effect, and those concerned agree or do not weary for want of salary to recompense their pains." These successive commissions show plainly the strong desire of Scotland for a code, and some of the causes of their failure are equally clear. The times were too troubled for such a measure, and no sufficient provision had been made for the cost of the preparation of a code. Though it was possible to have a code for a small country as early as the 17th, and even the 16th or 15th century, as was shewn by the example of Denmark, which perhaps stimulated Scottish legislators, it is also evident that such a code would not have corresponded to the circumstances of modern business and social relations, and would have had to be to a large extent rewritten.

SUBSECTION (3).—*Modern Efforts in Codification.*

51. The union with England put a stop to the attempt to codify the law of Scotland, and for a time to the desire to do so, lest the law of Scotland secured by the Treaty of Union should be injured. This desire revived owing to the writings of Bentham and the many successful attempts to codify made successively in all the countries of Europe from the time of Frederick the Great of Prussia to that of the late Emperor of Germany. The British colonies and dependencies, and the Indian Empire, followed the Continental example. The Code Napoleon so largely adopted in, or adapted to, other countries; the various Indian Acts on contracts, limitations, procedure, both civil and criminal, evidence, etc., in substance partial codes, or sections of a code, and amounting together to a complete code applicable to the great variety of races and languages in India subject to the British Empire, as well as to British born residents within it; and the two German Codes, one for mercantile law (Allgemeines Handels Gesetzbuch), published in 1881, which contains the whole mercantile law, except bills, already codified in 1848, and the other for civil law generally, passed in July 1896—are amongst the most important examples of the modern codes.

52. Great Britain, though the birthplace of Bentham, has begun its codification later, at a slower pace and according to different methods; and what has been done for Scottish law has been done in concert with England, and to a large extent with the result of assimilating, as well as codifying, the law of the two countries. In England a commencement was made by two processes, both of which have been slow but useful. One was the revision of the Statute Book by a committee of judges, lawyers, and officers of State, who employed younger lawyers at small salaries to revise the Statute Book, by striking out obsolete, redundant, repugnant, and superfluous provisions. By this means the Statutes at large down to 1867 were reduced from eighty-five volumes to eleven volumes. The early Scottish Statutes have not yet been revised, though a proposal to this effect was submitted, at the suggestion of the Statute Law Revision Committee, to that committee. The other process was the consolidation of Statutes in one or more Acts, which was carried out by Sir R. Peel in the Statutes called "The Criminal Law Consolidation Acts," or, after him, Peel's Acts. They consolidated the criminal law of England,[1] and do not apply to Scotland. But consolidation has practically been adopted in many larger Statutes dealing with some special branch of law, *e.g.* The Factory Acts, The Merchant Shipping Acts, The General Police Acts, and The Public Health Acts.

53. In 1882 a further step was taken, which will probably date as the commencement of codification proper in England and Scotland, just as the modern codification in Germany commenced with the Allgemeine Werksel Ordnung (Law of Bills of Exchange), agreed to at the Conference of Leipsic on 25th November 1848, and which became law by promulgation in the then separate German States between 1848 and 25th June 1850. Thirty-three years after, the English Act on the same subject[2] received the Royal assent in 1883, and became law for England and Ireland, and, with one or two modifications, for Scotland. The success of this Act was followed, though after too long delay, by the Partnership Act of 1890,[3] which applies both to England and Scotland, again with some modifications, and by the Sale of Goods Act, 1893,[4] which also, with some more important modifications, applies to Scotland. Since that date several important codifying Acts have taken their place on the Statute Book, some applicable to England alone, for example the Law of Property Act, 1922,[5] others applying to the United Kingdom, for example the Companies (Consolidation) Acts, 1908[6] and 1929.[7]

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[1] 7 & 8 Geo. IV. cc. 27–29. [2] 45 & 46 Vict. c. 61. [3] 53 & 54 Vict. c. 39. [4] 56 & 57 Vict. c. 71.
[5] 12 & 13 Geo. V. c. 16. [6] 8 Edw. VII. c. 69. [7] 19 & 20 Geo. V. c. 23.

LAW AGENT.

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SECTION 1.—DEFINITION.

54. Law agent is the generic name applied in Scotland to every person, other than a member of the Faculty of Advocates, entitled to practise in a Court of law. It is thus practically synonymous with the English term solicitor.

SECTION 2.—HISTORY.

55. The rise of professional lawyers in Scotland seems to have been due to the introduction of the Civil and Canon laws. As the clergy were the only body of men capable of reading and explaining the Latin compilations of those laws, their advice and assistance were naturally sought by litigants; and they accordingly appear to have assumed gradually the character of advocates in the Ecclesiastical Courts. It is impossible to ascertain with any accuracy the date at which professional pleaders first appeared in our temporal Courts; but they certainly did so long before the year 1532, the date of the institution of the Court of Session, when it was expressly provided that a certain number of advocates and procurators should be appointed to plead in that Court. See ADVOCATE.[1]

56. For more than a century and a half advocates practised in the Court of Session without the aid of law agents. But the inconveniences arising from the employment of the same person as advocate and law agent led gradually to the formation of three classes of law agents, namely, advocates' first clerks, writers to the signet, and solicitors. The advocates' first clerks, among whom were frequently to be found young men studying for the bar, were the head assistants of the advocates. Entrusted with the practical details of their masters' causes, they naturally took advantage of their position in order to act as law agents on their own account, a practice which the Court at first tacitly permitted and eventually recognised. This body has, however, ceased to exist as a separate class of practitioners, its members having been united since 1850 with the Society of Solicitors in the Supreme Courts.[1] The writers to the signet appear to have been originally clerks in the office of the Secretary of State, who had charge of the King's seal, and thus to have been officially engaged at the initial stage of litigation. They were, however, for a long time prohibited from acting as law agents in the Court of Session. But the prohibitions became obsolete about the beginning of the eighteenth century, and in 1754 the Court expressly recognised the right of writers to the signet to practise as law agents. In the meantime, notwithstanding numerous prohibitions, a third class of law agents, generally called solicitors, had gradually established themselves in the Court of Session, and their right to practise was recognised in 1754. These formed a society which is now incorporated under the name of the Society of Solicitors in the Supreme Courts of Scotland.

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[1] Vol. I. p. 172, *ante*.

57. While the position of practitioners in the Supreme Courts was being thus gradually modified, there was no corresponding change among the practitioners in the inferior Courts, who were generally called writers or procurators. These practitioners had the entire management of their clients' causes, but were entitled to practise only in the particular inferior Court to which they had been admitted, and they were excluded from the Supreme Courts. In several of the more important Sheriff Courts, namely, those of Aberdeen, Glasgow, Edinburgh, and Paisley, the practitioners soon formed themselves into local societies, the members of which had the exclusive privilege of practising in those Courts, and the societies prescribed separate regulations as to the qualifications, examination, and admission of candidates, apprenticeship to a membes being generally indispensable. To secure a uniform system of legal training for others than members of the societies above mentioned, the Court of Session passed an Act of Sederunt in 1825 rendering it necessary for candidates to serve an apprenticeship of three years with a writer to the signet, solicitor, or procurator. A very material improvement in the position of practitioners in the inferior Courts was effected by the Procurators Act of 1865,[2] especially as regarded the qualifications of candidates, and the formation of a large number of provincial societies of law agents under the powers of incorporation conferred by that Act.

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[1] See para. 115, *infra*.

[2] 28 & 29 Vict. c. 85.

58. In 1870 the Royal Commissioners appointed to inquire into the Courts of law in Scotland unanimously recommended that there should be one general examination applicable to law agents throughout Scotland, that all exclusive privileges should be abolished, and that arrangements between town agents and country agents for the division of the profits of litigations should be legalised; and to these recommendations effect was given by the Law Agents Act of 1873,[1] which contains further provisions to be afterwards mentioned. For a long time previously notaries public had been very generally employed, not merely in doing strictly notarial work, but also in conveyancing and every kind of legal business except Court practice. Under s. 24 of the Law Agents Act a considerable number of such notaries, of seven years' standing, were admitted as law agents. The same statute (s. 3) gave great facilities to notaries public to be admitted as law agents, and of these facilities advantage has been taken by a large number of notaries.[2] No person can now be admitted as a notary public in Scotland until he has been admitted and enrolled as a law agent,[3] so that the anomalous position of notaries public in Scotland is practically a thing of the past. See NOTARY PUBLIC.

SECTION 3.—QUALIFICATION AND ADMISSION.

59. The qualifications and mode of admission of law agents are now regulated by the Law Agents Act of 1873,[4] as amended by the Law Agents and Notaries Public (Scotland) Act, 1891,[5] and the Law Agents (Scotland) Act Amendment Act, 1896, and by several Acts of Sederunt passed by the Court of Session under the powers conferred by those Acts. Under these statutes women could not be admitted to practise as law agents, but this disability has been removed by the Sex Disqualification (Removal) Act, 1919.[6] The regulations fall under three heads, viz.: (1) Apprenticeship; (2) Examinations in general knowledge and in law; and (3) Admission by the Court of Session.

SUBSECTION (1).—*Apprenticeship.*

60. The apprenticeship required by the Law Agents Act (s. 5) consists of service under a valid indenture or contract of service with a practising law agent, or with a sheriff-clerk.[7] When (as generally happens) the apprentice is a minor, his father, or, in the event of his father being dead, his curators, if he has any, should be consenting parties to the indenture. In every case the apprenticeship must be under a written indenture, to be recorded in the register of probative writs of the county in which it is made, and intimated to the Registrar of Law Agents within six months from the date fixed for the commencement of the apprenticeship. The proper mode of intimating an indenture to the registrar is by sending him an extract after the indenture has been duly recorded, together with a fee of 2s. 6d. This should be attended to by the master of the apprentice.

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[1] 36 & 37 Vict. c. 63.

[2] *A. B. and Ors.*, 1896, 34 S.L.R. 232.

[3] 59 & 60 Vict. c. 47, s. 2.

[4] 36 & 37 Vict. c. 63.

[5] 54 & 55 Vict. c. 30.

[6] 9 & 10 Geo. V. c. 71, s. 1.

[7] *S.S.C. Society* v. *Robertson*, 1895, 3 S.L.T. 59.

61. In the indenture the apprentice must bind himself to serve his master in his professional business for a period not less than that prescribed by the Act, viz. in the ordinary case, five years, but in the case of the following persons, three years, viz.: (*a*) A person who has for five years been a clerk to and engaged under the superintendence of a practising law agent in such business as is usually transacted by law agents; (*b*) a person holding a degree in Law or in Arts of a university in Great Britain or Ireland, granted after examination (the Examiners do not require that the degree be taken before the apprentice is bound, but regard a degree taken at any time during the apprenticeship as justifying an apprenticeship of only three years); (*c*) a member of the Faculty of Advocates; (*d*) a person who has been called to the degree of Utter Barrister in England; (*e*) a person who has been admitted and enrolled as an attorney or solicitor in England. Indentures must be stamped in accordance with the provisions of the Stamp Act, 1891, ss. 26, 27, and 28, and the clause "Articles of Clerkship" in the schedule appended to the Act, the stamp duty being £60 when the apprentice becomes bound to serve in order to his admission as a law agent to practise before the Court of Session, or as writer to the signet, but only 2s. 6d. when he becomes bound to serve in order to his admission as a law agent to practise before a Sheriff Court. But it is expressly provided that a person paying only 2s. 6d. may at any subsequent time pay the difference between 2s. 6d. and £60, and so become entitled to practise in the Court of Session (s. 26 (2)). The result is that no apprentice need pay more than 2s. 6d. on his indenture, unless he is qualifying himself for admission to the Society of Writers to the Signet.

62. When, from necessary or reasonable cause, the whole period of apprenticeship under an indenture cannot be completed with the master therein named, the Law Agents Act provides (s. 5, subs. 4) that the remainder of the period may be completed with another qualified master. The assignation of the indenture requires to be stamped, the duty being 10s., or (where only 2s. 6d. has been paid on the previous indenture) 2s. 6d., and to be intimated to the Registrar of Law Agents within six months of its date. It is further provided by the Law Agents Act (s. 5, subs. 5) that a master may permit his apprentice to serve any part of his term not exceeding two years with another qualified master; the Examiners recommend that the permission be given in the form of a short writ, an assignation of the indenture not being necessary. On the death of a master during the apprenticeship, the practice of the Examiners has been to recommend to the apprentice to enter into a second indenture with another master to serve the period required to complete the apprenticeship. The kind of service, as an apprentice, required by the Act has been fully canvassed in a recent case.[1]

Subsection (2).—*Examinations in General Knowledge and in Law.*

63. Under the powers conferred by s. 8 of the Law Agents Act, amended by the Act of 1891, the judges of the Court of Session have passed several Acts of Sederunt appointing a Board of Examiners, instituting examinations, and prescribing the subjects thereof, in general knowledge, in book-keeping and accounting, and in law. The power now possessed by the judges of the Court of Session to render compulsory the attendance of candidates at university or other classes remained unexercised till the passing of the Act of Sederunt, dated 12th March 1926, which requires the production of a certificate of having attended and duly performed the work of the classes of Scots Law and Conveyancing in a Scottish University, except in cases where apprenticeship commenced prior to the date of the Act. The existing regulations are contained in this Act of Sederunt. Special provisions have been made for candidates in course of qualifying under the old regulations; and the possession of certain qualifications exempts candidates from examination, wholly or partly. The Clerk to the Examiners will supply for one shilling a print containing the regulations in force, and specimen questions of the examinations.

Subsection (3).—*Admission by the Court of Session.*

64. The only mode of admission as a law agent is that prescribed by s. 7 of the Law Agents Act, viz. by petition to the Court of Session, praying their Lordships to admit the applicant. As it is the duty of the Clerk to the Examiners, when required by the applicant, to present and carry through such petition free of expense, other than the examination fees, it is not necessary to state here the proper procedure. To entitle the candidate to present the petition, he must be twenty-one years of age, have completed his apprenticeship, and passed the examinations in general knowledge, and the book-keeping and accounting examination, or have obtained their equivalents. Before being admitted he must have passed the examination in law, or its equivalent, and must give at least twenty-eight days' notice to the Clerk to the Examiners, lodging at the same time (1) certificate of birth, (2) extract indenture duly discharged, (3) assignation thereof, or second indenture or agreement duly discharged if such was entered into, (4) certain certificates in evidence of educational and other qualifications. Beyond this the candidate does not require to take any oath, or to make any declaration, on admission.

Subsection (4).—*Stamp Duty.*

65. Before being actually admitted the candidate must pay the stamp duty required by the Stamp Act, 1891, viz. £55 for admission to practise in the Sheriff Courts, or £85 for admission to practise before the Court of Session, or as a writer to the signet, under deduction in each case of the sum already paid on his indenture. By s. 17 of the Law Agents Act any law agent in the Sheriff Court may at any time practise in the Court of Session on payment of the £30 of difference between the two stamp duties. A Sheriff Court agent may, without payment of such difference, act as sole agent in any civil cause appointed to be tried by jury in any circuit town.[1]

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[1] *Scottish Law Agents Society* v. *Campbell*, 1927 S.C. 804.

SUBSECTION (5).—*Enrolment.*

66. Under the Law Agents Act, the name of every law agent admitted by the Court must be enrolled by the Registrar of Law Agents, who is entitled, under Act of Sederunt, 3rd December 1896, to a fee of 2s. 6d. for entering the name in his alphabetical register, and granting a certificate of the enrolment. Every law agent so enrolled is deemed to be admitted to all Courts of law in Scotland, subject to the provisions of the Stamp Act above mentioned; but in order to practise in any Court he must sign the roll of agents practising in such Court, paying 5s. for each subscription, and delivering a note specifying his place of business, and also a similar note as often as he changes his place of business.[2]

SUBSECTION (6).—*Colonial Solicitors.*

67. A solicitor of a superior Court in a British possession to which the Colonial Solicitors Act, 1900,[3] applies, and who has been in practice before the Court for not less than three years, may, on giving due notice and the prescribed proof of his qualifications and good character, without examination, and either after service of articles of clerkship or indentures of apprenticeship during the prescribed period (or, in the prescribed cases, without such service), be admitted a solicitor of the Court of Session, on payment of the prescribed amount in respect of stamp duties and fees. Where the King in Council is satisfied, on the report of a Secretary of State, as respects a superior Court in a British possession—(1) that the regulations as to the admission of persons to be solicitors of that superior Court were such as to secure that those solicitors possess proper qualifications and competency; and (2) that by the law of the British possession the solicitors of the Supreme Court (*i.e.* in Scotland, any enrolled law agent under the Law Agents (Scotland) Act, 1873) will be admitted to be solicitors of the superior Court in the possession, on terms as favourable as those on which it is proposed to admit solicitors of that superior Court under the Act to be solicitors of the Supreme Courts in Great Britain, His Majesty in Council may order that the Act shall apply to the said superior Court and British possession.

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[1] Court of Session Act, 1868 (31 & 32 Vict. c. 5), s. 46.

[2] Law Agents Act, 1873 (36 & 37 Vict. c. 63), ss. 2, 12, 13, 14, 16.

[3] 63 Vict. c. 14.

SECTION 4.—CERTIFICATE OR LICENCE TO PRACTISE.

68. For more than a century past, every practising law agent has been obliged to take out annually a stamped certificate or licence to practise. The matter is now regulated by the Stamp Act, 1891,[1] and the clause "Certificate" in the schedule appended thereto. The stamp duty, in the case of a person practising or carrying on his business within the city or shire of Edinburgh, is £9 if he has been admitted for three years or upwards, or £4, 10s. if he has not been so long admitted. In the case of a person practising or carrying on his business beyond those limits, the duty is £6 if he has been admitted for three years or upwards, or £3 if he has not been so long admitted. The certificate ought to be renewed in November of each year. The failure of a law agent to take out his certificate does not render his admission void; but if he practises as a law agent in any Court, or acts as a notary public, he incurs the statutory penalties, viz. a fine of £50, and incapacity to sue for any fee, reward, or disbursement.[2] The similar provisions of former statutes have been held to prevent a law agent who has failed to take out his annual certificate from taking decree in his own name for expenses found due to his client.[3]

69. Sec. 44 of the Stamp Act, 1891 (re-enacting the provisions of s. 60 of the Stamp Act, 1870), imposes a penalty of £50 on "every person who (not being a barrister, or a duly certificated solicitor, law agent, writer to the signet, notary public, conveyancer, special pleader, or draftsman in equity) either directly or indirectly, for or in expectation of any fee, gain, or reward, draws or prepares any instrument relating to real or personal estate, or any proceeding in law or equity." But it further provides that the expression "instrument" does not include a will or other testamentary instrument, "an agreement under hand only," a letter or power of attorney, or a transfer of stock containing no trust or limitation thereof. A law agent, enrolled but not in possession of the annual certificate to practise, signed a trust disposition and settlement on behalf of a testatrix who was unable to write, and it was held in an action for reduction of the deed on the ground of invalidity of execution that the deed had been validly executed, in respect that the person signing for the granter possessed the qualification of a law agent within the meaning of Conveyancing (Scotland) Act, 1924.[4] The exception of agreements under hand only, *i.e.* not under seal, appears sufficiently wide to include every kind of contract, as Scots deeds never are executed under seal. The consequences of the neglect of a law agent or a notary public to take out a certificate are personal to himself: his acts are quite valid as far as third persons are concerned.

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[1] Secs. 43-48.

[2] *Innes* v. *M'Donald*, 1899, 2 F. 6.

[3] *Ewing* v. *Wallace*, 1832, 6 W. & S. 222.

[4] *Stephen* v. *Scott*, 1927 S.C. 85; 14 & 15 Geo. V. c. 27, s. 18 (1).

SECTION 5.—UNQUALIFIED PRACTITIONERS.

70. At common law no one is allowed to practise as a law agent in any Court without having been duly admitted, and persons attempting to do so are subject to severe penalties and punishment.[1] But in the Small Debt Court a party may appear by a member of his family, or by such other person as the Sheriff shall allow, such person not being an officer of Court.[2] Under the Law Agents and Notaries Public (Scotland) Act, 1891,[3] any person who is neither a law agent nor a notary public may be prosecuted summarily before the Sheriff if he, either by himself or in conjunction with others, wilfully and falsely pretends to be, or takes or uses any name, title, addition, or description implying that he is duly qualified to act either as a law agent or as a notary public, or that he is recognised by law as so qualified, the maximum penalty being £10 and costs for the first offence, and £20 and costs, or, failing payment thereof, one month's imprisonment, for any subsequent offence.[4] "No costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as a law agent, or as a notary public, without being duly qualified so to act, or who, not being so qualified, gives legal advice, or frames or draws any deed, shall be recoverable in any action, suit, or matter by any person or persons whomsoever." [5] Unless a person possesses a duly stamped certificate, as required by s. 43 of the Stamp Act, 1891, he is not a "duly qualified" law agent; and even if his client gets decree with expenses, neither he nor his client can recover.[6]

SECTION 6.—PRIVILEGES.

71. Subject to the statutory provisions already mentioned with reference to stamp duty and subscription of Court rolls, every law agent enrolled by the Registrar of Law Agents is entitled to practise in any Court of law in Scotland.[7] Only members of the Faculty of Advocates are entitled to practise as counsel in the Supreme Courts of Scotland, viz. the Court of Session, the Commission of Teinds, the High Court, and the Circuit Courts of Justiciary.[8] But an enrolled law agent may practise in the double capacity of counsel and agent in the Bill Chamber of the Court of Session, and in all the inferior Courts in Scotland, viz. Sheriff Courts, Burgh Courts, Admiralty Courts, Dean of Guild Courts, Justice of Peace Courts, Police Courts, and all other Courts of law having only local jurisdiction.[9] The restriction of a law agent's right to appear in causes brought under the Small Debt Act [10] has been removed by the Small Debt Amendment Act, 1889.[11] A law agent is not entitled to borrow a process depending before any Supreme Court sitting in Edinburgh unless he has a place of business in Edinburgh or Leith, nor a process depending before any inferior Court unless he has a place of business within the jurisdiction of such Court.[1] In this matter counties united under the Sheriff Court Act of 1870 [2] are regarded as one sheriffdom and jurisdiction. Law agents as well as counsel are entitled to act in the conduct of complaints and appeals in the Presbyteries, Synods, and General Assembly of the Church of Scotland.[3] The largest and most lucrative part of the business of law agents consists, in most instances, of extrajudicial work; but in this they have no monopoly or exclusive privilege beyond such as arises from the statutory provisions already mentioned in regard to certificates or licences to practise and unqualified practitioners.

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[1] *Lord Advocate* v. *Hunter*, 1833, 11 S. 514; *A. B.* v. *C. D.*, 1834, 12 S. 504.

[2] 1 Vict. c. 41, s. 14.

[3] 54 & 55 Vict. c. 30, ss. 2 and 4.

[4] *Rutherford* v. *Thyne*, 1907 S.C. 84.

[5] *Ibid.*, s. 3.

[6] *Innes* v. *M'Donald*, 1899, 2 F. 6.

[7] 36 & 37 Vict. c. 63, s. 2.

[8] Mackay, Practice, i. 106.

[9] 36 & 37 Vict. c. 63, s. 2.

[10] 1 Vict. c. 41, ss. 14 and 17.

[11] 52 & 53 Vict. c. 26, s. 8.

72. Law agents are eligible for various offices besides those that may be held by any other fit and competent persons, such as those of clerkships in the Court of Session and Bill Chamber,[4] and (along with advocates) of salaried Sheriff-Substitute, provided they are of not less than five years' standing in their profession.[5] They are exempted from serving upon juries, provided they have taken out their annual certificates and are in actual practice.[6] An enrolled law agent is entitled to be admitted a notary public as a matter of right; [7] and no other person can now be admitted as a notary public in Scotland.[8] In the discharge of the duties which they owe to their clients, law agents, as well as advocates, necessarily enjoy very considerable immunities and privileges. See ADVOCATE; [9] CONFIDENTIAL COMMUNICATIONS; [10] and DEFAMATION.[11]

SECTION 7.—APPOINTMENT OR RETAINER.

73. Except in a few matters regulated by the forms of procedure in Court, the appointment of a law agent is governed by the general law applicable to the appointment of ordinary agents or factors. See AGENCY.[12] The mere acceptance of employment creates the relation of agent and client, with all its implied consequences. Writing is not essential, and in practice a formal authority is seldom asked or given, except where the powers to be conferred are beyond the scope of a law agent's usual employment. A written mandate, however, is required by the rules of judicial procedure when the client is out of Scotland, and also when a law agent subscribes a petition for service or sequestration of a client; and where the authority of an agent to raise or defend an action is disputed, the Court will allow him a reasonable time in which to lodge a mandate.[1] In the inferior Courts a law agent appearing for a defender is required to produce, along with his defences, either a written mandate or the copy of citation given to the defender; but this rule is rarely enforced, unless the law agent's authority is disputed by the pursuer.

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[1] 36 & 37 Vict. c. 63, s. 15.

[2] 33 & 34 Vict. c. 86, s. 12.

[3] Hill, Practice, 6th ed., p. 18.

[4] 52 & 53 Vict. c. 55, s. 8.

[5] 40 & 41 Vict. c. 50, s. 4.

[6] 6 Geo. IV. c. 22, s. 2.

[7] 36 & 37 Vict. c. 63, s. 18.

[8] 59 & 60 Vict. c. 49, s. 2.

[9] Vol. I. p. 172, *ante*.

[10] Vol. IV. p. 344, *ante*.

[11] Vol. V. p. 483, *ante*.

[12] Vol. I. p. 194, *ante*.

74. The contract of employment of a law agent may be proved *prout de jure*, that is to say, by every legal means of probation—parole, documentary, oath of party on reference, and circumstantial evidence.[2] The presumptions arising from the circumstances of the employment and the legal sufficiency of the evidence vary according as the question is raised between party and party, or between agent and client. Where a country agent instructs an Edinburgh agent to carry on a litigation, the presumption is that the latter is the agent of the client and not of the country agent.[3] It must, however, be borne in mind that innominate contracts of unusual or anomalous nature can be proved only by writ or oath on reference.[4]

SECTION 8.—AUTHORITY.

75. The extent of an agent's authority depends in each case on the character of the work which he has been employed to perform. In a question between agent and client a reasonable latitude will be allowed in construing the client's mandate or instructions;[5] but a mandate to carry on proceedings in an inferior Court does not warrant an appeal to the Court of Session;[6] and, similarly, authority to conduct a litigation in that Court does not cover an appeal to the House of Lords.[7] In the general conduct of judicial proceedings a law agent is entitled to exercise his own discretion,[8] subject to the directions of counsel when counsel are employed;[9] but he is not entitled to abandon an action without communicating with his client,[10] and he requires express authority to enter into a judicial reference.[11] In questions with third parties a client cannot, by means of a secret reservation, divest his law agent of the authority implied by the work which the agent has been employed to perform;[12] but, on the other hand, third parties are not entitled to rely on a law agent as holding a general authority.[1] Thus where a debtor repaid his loan to the bondholder's law agent, who embezzled the money, he was liable to the bondholder.[2] A law agent, even though he may be employed to collect the rents and attend to the repairs of a property, has no general authority to grant leases on behalf of his employer.[2]

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[1] *Fischer & Co.* v. *Andersen*, 1896, 23 R. 395; *Ferguson, Davidson & Co.* v. *Paterson, Dobbie and Ors.*, 1898, 1 F. 227.

[2] *M'Pherson's Trs.* v. *Watt*, 1877, 5 R. (H.L.) 9.

[3] *Clark & Macdonald* v. *Schulze*, 1902, 4 F. 448.

[4] *Downie* v. *Black*, 1885, 13 R. 271; *Reid* v. *Reid Bros.*, 1887, 14 R. 789; *Mackay* v. *Macarthur*, 1899, 36 S.L.R. 662.

[5] *Stewart* v. *Kidd*, 1852, 14 D. 527; *Smith* v. *Harris*. 1854, 16 D. 727; *Barclay* v. *Glendronach Distillery Co*,, 1868, 7 M. 9; *Clarke* v. *M'Nab*, 1888, 15 R. 569.

[6] *Stephen* v. *Skinner*, 1863, 2 M. 287.

[7] *Robertson* v. *Foulds*, 1860, 22 D. 714.

[8] *Buchanan* v. *Davidson & Stevenson*, 1877, 14 S.L.R. 233.

[9] *Batchelor* v. *Pattison & Mackersy*, 1876, 3 R. 914.

[10] *Urquhart* v. *Grigor*, 1857, 19 D. 853; *Thoms* v. *Bain*, 1888, 15 R. 613.

[11] *Livingston* v. *Johnson*, 1830, 8 S. 594.

[12] *Edmunds* v. *Bushell*, 1865, L.R. 1 Q.B. 97.

76. When the conduct of a cause is in the hands of counsel, a law agent is bound to act according to counsel's directions, and has consequently an implied authority to carry out such directions.[3] As to the authority of counsel, see ADVOCATE.[4] A law agent acting without counsel has no implied power to submit to arbitration a process which he has been employed to conduct;[5] and a practitioner in the Sheriff Court can neither propone improbation,[6] nor bind his client to a reference to oath, without written authority.[7] Whether a law agent has ever an implied power to compromise an action or claim has never been positively decided in Scotland; but power to compromise implies power to waive expenses.[8] Of course, proceedings in excess of the authority originally conferred may be subsequently adopted or homologated.[9]

77. A law agent's authority may terminate in any of the ways in which the relation of principal and agent may be dissolved. Thus the authority may be recalled by the client, not only by express revocation,[10] but by implication, as where the same powers are conferred on a different person, subject to due notification to third parties, who may have been led to rely on the agent's authority. A law agent is entitled to resign on giving reasonable notice of his intention.[11] Further modes in which a law agent's authority may terminate are by the death, incapacity, or bankruptcy of either agent or client;[12] but a short fit of insanity may not be sufficient;[13] and a law agent may, notwithstanding his supervening bankruptcy, do any formal acts incumbent on him as agent.

SECTION 9.—REMUNERATION.

78. When a law agent is employed professionally, or even to do work not strictly professional, he does not require to stipulate that he shall be paid for his services; the mere fact of his having been employed raises a presumption that he is to be remunerated at the ordinary rate, as well as repaid his incidental outlays; and the strength of the presumption varies according to the nature of the employment.[1] The statutes allowing English solicitors to enter into written agreements with their clients as to the amount and mode of remuneration do not apply to Scotland. Our law still regards with great suspicion and jealousy any alleged agreement to deviate from the fixed tariff, and it is thought that a law agent cannot enforce an agreement under which he is to receive more than the usual professional remuneration. A client has been allowed to displace by parole evidence the presumption against his law agent's agreement to act for a modified fee or gratuitously.[2] Where there was a provision for allocation of promotion expenses in a private Act of Parliament, the employer's common-law liability was not thereby excluded,[3] and in company flotation the Table of Fees does not apply.[4] See Expenses.[5]

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[1] *Forbes's Exrs.* v. *Western Bank*, 1854, 16 D. 807; *Stott* v. *City of Glasgow Bank*, 1879, 6 R. 1126; *Wishart* v. *City of Glasgow Bank*, 1879, 6 R. 1341.

[2] *Peden* v. *Graham*, 1907 (O.H.), 15 S.L.T. 143; *Danish Dairy Co.* v. *Gillespie*, 1922 S.C. 656.

[3] *Batchelor* v. *Pattison & Mackersy*, 1876, 3 R. 914.

[4] Vol. I. p. 172, *ante*.

[5] *Livingston* v. *Johnson*, 1830, 8 S. 594.

[6] A.S., 10th July 1839, s. 91.

[7] *Ibid.*, s. 84.

[8] *Torbat* v. *Torbat's Trs.*, 1907 (O.H.), 14 S.L.T. 830; but see *M'Laughlin* v. *Pumpherston Oil Co.*, 1915 S.C. 65; *Smith* v. *Smith*, 1927, S.L.T. 462.

[9] *Robertson* v. *Foulds*, 1860, 22 D. 714; *Thoms* v. *Bain*, 1888, 15 R. 613.

[10] *Cormack* v. *Keith & Murray*, 1893, 20 R. 977.

[11] *Urquhart* v. *Grigor*, 1857, 19 D. 853; *Scott* v. *Christie*, 1856, 19 D. 178.

[12] *M'Kenzie* v. *Campbell*, 1894, 21 R. 904.

[13] *Wink* v. *Mortimer*, 1849, 11 D. 995.

79. A law agent is bound to make out his accounts at his own expense, whenever required by his clients. As to these, and the parties liable in payment of them, see Expenses.[5] A law agent who renders a business account to a client thereby offers to accept the amount stated in it; but the client is not bound to pay till the account has been taxed. The doctrine of settled accounts does not apply in questions between agent and client, so that a client is not barred from having his law agent's business account taxed by the fact that he has received from him a balance after deduction of the amount of his business account.[6] Where the employment is admitted or proved, it is for the auditor, in taxing the account, to see that the work charged for has been actually done.[7] Where the account has been incurred in judicial proceedings, and liability is not denied by the client, either the law agent or the client may present a summary application to the Court of Session or to the Sheriff Court, as the case may be, to have the account remitted for taxation to the Auditor of Court, and decree given for the taxed amount.[8]

80. The triennial prescription or limitation introduced by the Statute 1579, c. 83, is applicable to the business accounts of law agents, including ordinary professional disbursements as well as remuneration for services; so that, if such accounts are not sued for within three years from their close, the constitution and the subsistence of the debt can be proved only by the writ or oath of the client or his representative. See Prescription.

81. A law agent who is employed to conduct litigation is entitled to a hypothec or preference on the costs to be recovered from his client's opponent, and the privilege has been extended by statute to the case of property recovered or preserved through the law agent's instrumentality.[1] See HYPOTHEC.[2]

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[1] *Mackersy's Exrs.* v. *Managing Board of St. Giles Cathedral*, 1904, 12 S.L.T. 96, 391.

[2] *Jacobs* v. *Macmillan*, 1899, 2 F. 79; *A. & A. Campbell* v. *Campbell's Exrs.*, 1910, 2 S.L.T. 240; *Mackersy's Exrs.* v. *Managing Board of St. Giles Cathedral*, 1904, 12 S.L.T. 391.

[3] *Campbell* v. *County Council of Ayr and Ors.*, 1906, 14 S.L.T. 534.

[4] *Welsh & Forbes* v. *Johnston and Ors.*, 1906, 8 F. 453; see also *Brownlie, Watson & Beckett* v. *Caledonian Rly. Co.*, 1907 S.C. 617; *Bolden* v. *Fogo*, 1850, 12 D. 798.

[5] Vol. VI. p. 516, *ante*.

[6] *Cockburn* v. *Clark*, 1885, 12 R. 707.

[7] *Hamilton* v. *Brown*, 1890, 17 R. 505.

[8] A.S., 6th February 1806; A.S., 10th July 1839, ss. 110, 111, 112.

82. A law agent acting as trustee (though of course entitled to be reimbursed his actual outlays properly made) is not entitled to make professional charges, nor is the firm of which he is a member,[3] unless the trust-deed confers the right to do so,[4] or unless the beneficiaries, being *sui juris* and aware of this rule of law, either agree to give remuneration[5] or acquiesce in the making of professional charges.[6] But a law agent who is a mortgagee is entitled to his business charges in connection with the security subjects.[7]

SECTION 10.—LIEN OVER CLIENT'S DOCUMENTS.

83. Law agents are entitled to retain, in security of their business accounts, any documents belonging to their clients which may come into their possession in the course of their employment. This privilege is sometimes, but inaccurately, called a hypothec; it is merely a general lien or right of retention, not amounting to a real right either of hypothec or of pledge. It confers no active right on the law agent, but operates through the inconvenience which a client may suffer from being deprived of the evidence of his rights as creditor or proprietor.[8] On the law agent's bankruptcy this privilege passes to the trustee on his sequestrated estate,[9] and, on the agent's death, to his personal representatives.[10] The lien extends to title-deeds, securities, documents of debt, and all other papers properly belonging to the client, but not to documents which are the subject of judicial proceedings,[11] documents of which the law agent has got possession merely through their having been produced in process,[12] nor such as came into the law agent's hands after the notour bankruptcy of his client.[13] The papers must, in order to be subject to the lien, have come into the law agent's possession lawfully and in the course of his employment as agent for the owner.[14]

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[1] *Welsh* v. *Cousin*, 1898, 5 S.L.T. 366.

[2] See Vol. VIII. p. 1, *ante*.

[3] *Home* v. *Pringle*, 1841, 2 Rob. App. 384; *Manson* v. *Baillie*, 1855, 2 Macq. 80; *Aitken* v. *Hunter*, 1871, 9 M. 756.

[4] *Orr's Trs.* v. *Auld*, 1851, 14 D. 181; *Findlay's Trs.* v. *M'Omie*, 1852, 14 D. 621; *Goodsir* v. *Carruthers*, 1858, 20 D. 1141; *Welch* v. *Jackson*, 1864, 3 M. 303; *In re Chalinder & Herington*, [1907] 1 Ch. 58.

[5] *Lauder* v. *Millars*, 1859, 21 D. 1353; *Scott* v. *Handyside's Trs.*, 1868, 6 M. 753.

[6] *Manson* v. *Baillie*, 1855, 2 Macq. 80; *Ommaney* v. *Smith*, 1854, 16 D. 721; *Hope* v. *Hope*, 1856, 18 D. 585; *Dixon* v. *Rutherford*, 1863, 2 M. 61.

[7] *More* v. *Kirkhope & Gilmour*, 1907, 15 S.L.T. 203; but see *Robertson-Durham* v. *Constant*, 1907, 15 S.L.T. 131; *Sleigh* v. *Sleigh's Factor*, 1908 S.C. 1112.

[8] *Christie* v. *Ruxton*, 1862, 24 D. 1182.

[9] *Paul* v. *Dickson*, 1839, 1 D. 867; *Inglis* v. *Moncreiff*, 1851, 13 D. 622.

[10] *Wilson* v. *Lumsdaine*, 1837, 15 S. 1211; *Paul* v. *Meikle*, 1868, 7 M. 235.

[11] *M'Intosh* v. *Chalmers*, 1883, 11 R. 8.

[12] *Callman* v. *Bell*, 1793, Mor. 6255.

[13] *Jackson* v. *Fenwick's Tr.*, 1899, 6 S.L.T. 319.

[14] Bell, Com., 5th ed., ii. 111; *National Bank of Scotland* v. *White & Park*, 1909 S.C. 1308.

84. The lien covers the general balance due on the agent's accounts for professional services, whether such accounts were incurred before or after the papers came into his hands,[1] including disbursements properly made in the ordinary course of law agency,[2] but not cash advances,[3] commission on money transactions,[4] feu-duties or compositions, legacy or inventory duty, expenses of advertising,[5] disbursements as factor,[6] or cautionary obligations.[7]

85. The lien is pleadable not only against the client, but also against third parties claiming through him, such as his representatives, singular successors, creditors real as well as personal, and the trustee on his sequestrated estate.[8] The lien is, however, not available against third parties whose right is paramount or adverse to that of the client, where such parties require the documents for the purpose of proving facts.[9] The right of an heir of entail to the title-deeds of the estate being of a limited character, his law agent is not entitled to retain them from a succeeding heir, or from an adjudging creditor of the entailer;[10] nor is the law agent of a bondholder entitled to retain the title-deeds of subjects disponed in security against the proprietor of the subjects.[11]

86. The lien is subject to the equitable control of the Court, to prevent its abuse.[12] Thus if the law agent's accounts are judicially disputed, he is bound to deliver the papers on consignation of the amount claimed,[13] but not, generally speaking, on caution merely.[14] When the client's estates have been sequestrated, his law agent is bound to deliver all his papers to the trustee, but under reservation of his lien, the result being that, if his claim is well founded, he has a preference therefor over the whole sequestrated estates.[15] In claiming in the sequestration, he must put a specified value on his lien, and deduct such value from his debt.[16] The law agent of a company which is being wound up may be compelled to produce documents relating to the company, without prejudice to any lien he may have.[1]

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[1] *Menzies* v. *Murdoch*, 1841, 4 D. 257.

[2] *Skinner* v. *Paterson*, 1823, 2 S. (N.E.) 312; *Paul* v. *Meikle*, 1868, 7 M. 235; *Richardson* v. *Merry*, 1863, 1 M. 940.

[3] *Christie* v. *Ruxton*, 1862, 24 D. 1182.

[4] *Paul* v. *Dickson*, 1829, 1 D. 867.

[5] *Grant's Reps.* v. *Robertson*, 1801, 12 F.C. 507; *Skinner* v. *Paterson*, *supra*.

[6] *Largue* v. *Urquhart*, 1883, 10 R. 1229.

[7] *Grant's Reps.* v. *Robertson*, *supra*; *Lidderdale's Crs.* v. *Nasmyth*, 1749, Mor. 6248; *Kemp* v. *Youngs*, 1838, 16 S. 500.

[8] *Lidderdale's Crs.* v. *Naismith*, *supra*; *Dalrymple* v. *Earl of Selkirk*, 1751, 1 Bell's Ill. 465; *Wight* v. *Kidd*, 1828, 7 S. 70; *Gray* v. *Graham*, 1855, 2 Macq. 435.

[9] *Sutherland* v. *Couper*, 1738, Mor. 6247; *Stewart and Ors.*, 1742, Mor. 6248; *Dalrymple* v. *Earl of Selkirk*, *supra*; *Murray* v. *Scott*, 1829, 8 S. 161; *Montgomerie* v. *A. B.*, 1845, 7 D. 553.

[10] *Callander* v. *Laidlaw*, 1834, 12 S. 417.

[11] *Liquidator of Weir & Wilson, Ltd.* v. *Turnbull & Findlay*, 1911 S.C. 1006.

[12] *Ferguson & Stuart* v. *Grant*, 1856, 18 D. 536; *M'Intosh* v. *Chalmers*, 1883, 11 R. 8.

[13] *Craig* v. *Howden*, 1856, 18 D. 863.

[14] *Ferguson & Stuart* v. *Grant*, *supra*; *Skinner* v. *Henderson*, 1865, 3 M. 867.

[15] *Johnstone* v. *Bell*, 1823, 2 S. (N.E.) 133; *Paul* v. *Mathie*, 1826, 4 S. (N.E.) 424; *Skinner* v. *Paterson*, 1823, 2 S. (N.E.) 312; *Renny & Webster* v. *Myles*, 1847, 9 D. 619; *Adam & Winchester* v. *White's Tr.*, 1884, 11 R. 863.

[16] *Renny & Webster* v. *Myles*, *supra*; *Elder* v. *Thomson*, 1850, 12 D. 994; 19 & 20 Vict. c. 79, ss. 4, 59, and 65.

87. A law agent may waive his right of lien either by express agreement or by implication.[2] To take a bill or promissory note for the amount of an account does not imply such a waiver.[3] A law agent who acts for both borrower and lender in preparing a heritable security will be held to waive his right to retain the title-deeds as against the lender for the amount of accounts due by the borrower.[4] The lien is, of course, discharged by payment of the law agent's accounts; but if, in consideration of a payment to account, he abandons his lien over the title-deeds of a part of his client's property, he is entitled to retain the title-deeds of the remaining property for the whole unpaid balance of his accounts.[5]

88. A lien naturally comes to an end with the loss of possession,[6] but there are several cases in which a law agent is regarded as the legal possessor of documents which have ceased to be in his actual custody. Thus a country law agent who sends his client's papers to his Edinburgh agent, and a law agent who lends them to another agent employed by the client, still retain their rights of lien.[7] The mere production of a client's papers in a process does not seem to be such a loss of possession as to put an end to a lien over them.[8]

SECTION 11.—PROFESSIONAL LIABILITIES TO CLIENTS.

89. By the mere acceptance of employment, a law agent undertakes to perform, with due diligence and the requisite skill, the business committed to his charge,[9] and he and his representatives after him are liable to his employers for any loss or damage the latter may sustain through the breach of his implied undertaking.[10] He is, however, not liable to third parties, such as disappointed legatees or disponees.[11] But a claim once vested in a client transmits to his representatives.[12]

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[1] 25 & 26 Vict. c. 89, s. 115; *In re South Essex Estuary and Reclamation Co.*, 1869, L.R. 4 Ch. 215; *Liqr. of the Garpel Hæmatite Co.* v. *Andrew*, 1866, 4 M. 617; *Liqr. of Lochee Sawmills* v. *Stevenson*, 1908 S.C. 559.

[2] *M'Creadie* v. *Reid*, 1822, 1 S. (N.E.) 307; *Inglis* v. *Moncreiff*, 1851, 13 D. 622; *Smith* v. *Lamont*, 1858, 20 D. 912.

[3] *Palmer* v. *Lee*, 1880, 7 R. 651.

[4] *Wilson* v. *Lumsdaine*, 1837, 15 S. 1211; *Allan* v. *Sawers*, 1842, 4 D. 1356; *Paterson* v. *Currie*, 1846, 8 D. 1005; *Gray* v. *Graham*, 1855, 2 Macq. 435; *Liquidator of Weir & Wilson, Ltd.* v. *Turnbull & Findlay*, 1911 S.C. 1006.

[5] *Gray* v. *Graham*, *supra*.

[6] *Tawse* v. *Rigg*, 1904, 6 F. 544.

[7] *Walker* v. *Phin*, 1831, 9 S. 691; *Renny* v. *Rutherford & Kemp*, 1840, 2 D. 676; 1841, 3 D. 1134.

[8] Bell, Com., 5th ed., ii. 112; *Finlay* v. *Syme*, 1773, Mor. 6250; *Callman* v. *Bell*, 1793, 11 F.C. 172, and Mor. 6255.

[9] *Bell* v. *Ogilvie*, 1863, 2 M. 336.

[10] *Haldane* v. *Donaldson*, 1840, 1 Rob. App. 226; *Evans* v. *Stool*, 1885, 12 R. 1295; *Davies* v. *Hood*, 1903, 88 L.T. 19.

[11] *Fleming* v. *Robertson*, 1861, 4 Macq. 167; *Raes* v. *Meek*, 1889, 16 R. (H.L.) 31; *Williamson* v. *Begg*, 1887, 14 R. 720; *Tully* v. *Ingram*, 1891, 19 R. 65; *Auchincloss* v. *Duncan*, 1894, 21 R. 1091.

[12] *Goldie* v. *Macdonald*, 1757, Mor. 3527; *Goldie* v. *Goldie*, 1842, 4 D. 1489.

90. As regards the degree of diligence and skill required, *spondet peritiam artis*, each case depending upon its own circumstances.[1] Law agents employed in the conduct of litigation are liable if they grossly neglect to perform such duties as are generally allotted to their branch of the legal profession, for example, to make the necessary preparations for a trial;[2] but for any error or miscarriage in such proceedings they are not liable if they have *bona fide* acted under the direction or by the advice of counsel.[3] Law agents practising in the inferior Courts without the assistance of counsel will not be held responsible for the consequences of a mistake in a matter of law upon which a reasonable doubt may be entertained. But the greatest vigilance is required in carrying through proceedings of a criminal nature,[4] and also in the execution of diligence.[5] When a law agent requires to employ messengers-at-arms or sheriff-officers, he does not seem to be responsible for their negligence or misconduct, unless there has been some negligence or error on his own part.[6]

91. Conveyancing being a matter which falls within the proper and ordinary scope of a law agent's duties (the case of English solicitors seems somewhat different), he is not generally entitled to diminish his own responsibility by consulting counsel at his client's expense.[7] A law agent employed to draw a deed is generally expected to get it properly executed,[8] and to take the ordinary and usual steps to render it effectual.[9] In acting for a purchaser of heritable property, or for a lender on heritable security, a law agent is strictly bound to have the records searched, in order to discover encumbrances, unless his client has expressly dispensed with such a search,[10] and to investigate the title of the seller or borrower.[11] A lender's agent is further bound to get for his client an effectual obligation,[12] and proper heritable security where that kind of security is required by the client,[13] and also to ascertain as far as possible the amount of arrears of interest due on prior securities.[14]

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[1] *Frame & Co.* v. *Campbell, Hart & Hodge*, 1839, Macl. & R. 595; *Stewart* v. *M'Lean, Baird & Neilson*, 1915 S.C. 13.

[2] *Ritchie* v. *Macrosty*, 1854, 16 D. 554; *Urquhart* v. *Grigor*, 1857, 19 D. 853; *Simpson* v. *Kidstons, Watson, Turnbull & Co.*, 1913, 1 S.L.T. 74; see also *Shane* v. *Girvan*, 1927, S.L.T. 460.

[3] *Thomson* v. *Somerville*, 1818, 6 Pat. 393; *Burness* v. *Morris*, 1849, 11 D. 1258; *Batchelor* v. *Pattison & Mackersy*, 1876, 3 R. 914.

[4] *Frame & Co.* v. *Campbell, Hart & Hodge*, *supra*; *Smith* v. *Grant*, 1858, 20 D. 1077.

[5] *Slater* v. *Henderson & Scott*, 1822, 1 S. (N.E.) 229; *Brown* v. *Mackie*, 1852, 14 D. 358.

[6] *Elliot* v. *Romanes*, 1790, Hume 317; *Mark* v. *Somerville*, 1800, Hume 326; *Russell* v. *Hedderwick*, 1859, 21 D. 1325.

[7] *Hope* v. *Hope*, 1856, 18 D. 585; *Dixon* v. *Rutherford*, 1863, 2 M. 61.

[8] *Currie* v. *Colquhoun*, 1823, 2 S. (N.E.) 361; *Wallace* v. *Fisher & Watt*, 1870, 9 M. 75.

[9] *Lillie* v. *Macdonald*, 1819, 1 Bli. 315; *Rowand* v. *Stevenson*, 1830, 4 W. & S. 177; *Donald's Trs.* v. *Yeats*, 1839, 1 D. 1249; *Fleming* v. *Robertson*, 1861, 4 Macq. 167; *Auchincloss* v. *Duncan*, 1894, 21 R. 1091.

[10] *Graham* v. *Hunter's Trs.*, 1831, 9 S. 543; *Campbell* v. *Clason*, 1838, 1 D. 270; *Fearn* v. *Gordon & Craig*, 1893, 20 R. 352.

[11] *Donald's Trs.* v. *Yeats*, 1839, 1 D. 1249.

[12] *Rowand* v. *Stevenson*, 1830, 4 W. & S. 177; *Sim* v. *Clark*, 1833, 6 W. & S. 452.

[13] *Black* v. *Curror & Cowper*, 1885, 12 R. 990.

[14] *Campbell* v. *Clason*, 1840, 2 D. 1113; 1843, 5 D. 1081.

There is a considerable amount of English authority to the effect that a solicitor is not responsible for the pecuniary deficiency of a security, unless his position is one of trust as well as agency, or unless he has been specially instructed to see to the sufficiency of the security; and this view seems to have been taken in Scotland in the case of *Ronaldson*.[1] But in more recent Scots cases a stricter rule appears to have been applied, a law agent being regarded as an adviser as well as a conveyancer, so that he cannot recommend a security, or even bring an investment favourably under the notice of a client, without incurring some risk, especially if the client is inexperienced in such matters.[2]

92. A law agent who acts for both borrower and lender is in a very delicate position, being responsible to both parties for any failure in his professional duties;[3] and where no other professional man is employed than the agent of the borrower, he will be readily inferred to be acting also for the lender, even although he makes no charge against the latter.[4] In a transaction of sale a law agent cannot act for both seller and purchaser in settling the price,[5] and if he acts for both thereafter in carrying out the sale, his position is as delicate as that of a person acting for both borrower and lender. The difficulties naturally arising from this objectionable practice are well illustrated by the case undernoted,[6] where the House of Lords, while affirming the proposition laid down by the Court of Session, that the onus lay upon the law agent of proving that communications which ought to have been made were actually made by the law agent to the lender, differed from that Court on the question whether the onus was sufficiently discharged.[7] It is improper for one and the same agent to represent two or more parties to a special case where the clients have conflicting interests.[8]

93. Giving advice on doubtful points of law is deemed more peculiarly within the province of counsel than of law agents; but a law agent will not be held liable in damages for giving erroneous advice where there has been no clear and authoritative rule of law or practice.[9] A law agent who follows the usual course of practice throughout the country is not liable, although such practice should eventually be held to be erroneous.[10] A law agent of testamentary trustees has been held not bound to volunteer his advice to the trustees as to which of the investments made by the truster they were entitled to retain as trust investments.[1] The law agents for a trust for religious purposes were held not to be personally liable in repayment of income tax which had not been recovered owing to ignorance of an English decision that religious purposes were "charitable purposes" in the sense of the Income Tax Acts.[2]

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[1] *Ronaldson* v. *Drummond & Reid*, 1881, 8 R. 767.

[2] *Oastler* v. *Dill, Smillie & Wilson*, 1886, 14 R. 12; *Stirling* v. *Mackenzie*, 1886, 14 R. 179; *Cleland* v. *Brownlie, Watson & Beckett*, 1892, 20 R. 152; but see *Dick* v. *Alston*, 1911, 2 S.L.T. 250; *Wernham* v. *M'Lean, Baird & Neilson*, 1925 S.C. 407.

[3] *Sim* v. *Clark*, 1833, 6 W. & S. 452; *M'Leod* v. *M'Donald*, 1835, 13 S. 287; *Haldane* v. *Donaldson*, 1840, 1 Rob. App. 226; *Oastler* v. *Dill, Smillie & Wilson*, *supra*.

[4] *Struthers* v. *Lang*, 1827, 2 W. & S. 563; *Haldane* v. *Donaldson*, *supra*; *Fleming* v. *Robertson*, 1861, 4 Macq. 167.

[5] *M'Pherson's Trs.* v. *Watt*, 1877, 5 R. (H.L.) 9.

[6] *M'Clure, Naismith, Brodie & M'Farlane* v. *Stewart*, 1887, 15 R. (H.L.) 1.

[7] See also *Oastler* v. *Dill, Smillie & Wilson*, 1886, *supra*.

[8] *Ellis's Trs.* v. *Ellis*, 1898, 1 F. 4; *Stewart* v. *Maclean, Baird & Neilson*, 1915 S.C. 13.

[9] *Grant* v. *M'Leay*, 1791, Bell's Oct. Cas. 319; *M'Lean* v. *Grant*, 1805, 13 F.C. 495; *Cooke* v. *Falconer's Reps.*, 1850, 13 D. 157; *Blair* v. *Assets Co.*, 1896, 23 R. (H.L.) 36; *Faithfull* v. *Kesteven*, 1910, 103 L.T. 56.

[10] *Graham* v. *Alison*, 1833, 6 W. & S. 518; *Hamilton* v. *Emslie*, 1868, 7 M. 173.

94. As regards the extent of a law agent's liability, the general principle underlying all the decisions is that the agent is bound to put his clients in the same position as they would have occupied if he had properly performed the duties which he undertook. Thus when a client has been subjected in damages to a third party through the misconduct or blunder of his own law agent, he is entitled to recover, in an action of relief against the agent, the whole damages and expenses so incurred.[3] Similarly, when a debt or claim has been lost through the fault of the agent employed to use diligence for recovering it, his employer may sue him for the full amount of the debt or claim so lost; but in such a case the agent is entitled to an assignation of the debt or claim, *valeat tantum quantum.*[4] Thus, also, a law agent who has failed in his duty to procure a valid title for a purchaser must relieve his client of the transaction, by repaying him the price on receiving from him a conveyance of the property and inept title,[5] unless a valid title can still be completed, in which case it will generally be sufficient for him to make up such title at his own expense, and make good any loss occurring through the delay.[6] The same principle is applied to the law agent of a lender.[7]

95. A claim for reparation on the ground of negligence in the conduct of the affairs of a client is extinguished by the negative prescription of forty years.[8] *Mora*, or delay short of the prescriptive period, may, however, bar such a claim, where the circumstances raise an inference of abandonment or acquiescence on the part of the client.[9]

SECTION 12.—LIABILITIES TO OTHERS THAN CLIENTS.

96. To parties other than clients, law agents owe only the negative duty of abstaining from the commission of actual wrong. But where an agent has ceased to act for a party to a cause, it is his duty to furnish the opposite party's agent with his former client's address.[1] In the discharge of the positive duties which law agents owe to their clients, especially in the conduct of judicial proceedings, they necessarily enjoy considerable immunities and privileges. Thus a law agent is subject to no liability for having merely conducted, on the instructions of a client, ordinary judicial proceedings which have turned out to be unfounded; or for having used arrestments or inhibition on the dependence of an action, unless he has done so maliciously and without probable cause.[2] But where a party applies to the Court for some special remedy, which is granted only on the faith of his statement, as in the case of interdicts and of sequestrations for rent, his law agent may be liable in damages, not merely if there is an irregularity in the proceedings,[3] but also if the application has been granted on his unjustifiable personal representations.[4] For wrongfully executing a process caption, both the agent applying for it and his client are liable, conjunctly and severally, in damages.[5] The same observation applies to the execution of diligence against the goods or person of a debtor.[6] Even a purely technical objection to the validity of diligence is a relevant ground of damages,[7] as also the knowledge of extrinsic facts rendering improper the execution of diligence which is *ex facie* valid.[8]

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[1] *Currors* v. *Walker's Trs.*, 1889, 16 R. 355.

[2] *Free Church of Scotland* v. *M'Knight's Trs.*, 1916 S.C. 349.

[3] *Frame & Co.* v. *Campbell, Hart & Hodge*, 1839, Macl. & R. 595; *Smith* v. *Grant*, 1858, 20 D. 1077.

[4] *Graham* v. *Hunter's Trs.*, 1831, 9 S. 543; *M'Farlane's Exrs.* v. *Ferguson*, 1834, 12 S. 824; 1835, 13 S. 477.

[5] *Donald's Trs.* v. *Yeats*, 1839, 1 D. 1249.

[6] *Brown* v. *Cheyne*, 1831, 9 S. 573; 1833, 11 S. 497.

[7] *Lillie* v. *Macdonald*, 1819, 1 Bli. 315; *Campbell* v. *Clason*, 1838, 1 D. 270; 1840, 2 D. 1113; *Graham* v. *Hunter's Trs.*, *supra*.

[8] *Cooke* v. *Falconer's Reps.*, 1850, 13 D. 157; *Lillie* v. *Macdonald*, *supra*.

[9] *Gillon* v. *Drummond*, 1724, Mor. 3522; *Hunter* v. *Fleming*, 1829, 8 S. 234; *Cooke* v. *Falconer's Reps.*, *supra*.

97. A law agent who conducts legal proceedings without authority is personally liable to the opposite party in the expenses of process,[9] and may even be subjected in damages to him.[10] Expenses of process occasioned by a law agent's fault may be awarded against him personally.[11]

SECTION 13.—LIABILITIES ON CONTRACTS.

98. As a general rule, law agents, like most other agents, are not personally liable for obligations which they undertake in name and on behalf of their clients, provided they do not exceed their authority, express or implied.[1] The usual way in which an agent contracts in writing so as not to render himself personally liable is by adding to his signature the words "as agent of" his principal (naming him); but the mere addition to his signature on a bill of words describing him as an agent does not exempt him from personal liability; he must add words indicating that he signs for or on behalf of his named client.[2] Where the contract is not in writing, the agent's liability depends on the circumstances in each particular case, as shewing to whom the credit was given.[3]

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[1] *Gowans* v. *Adam*, 1908 S.C. 32.

[2] *Duffus* v. *Davidson & Clyne*, 1828, 4 Mur. 84; *Baillie* v. *Hume & Adamson*, 1853, 16 D. 161.

[3] *Cowan* v. *Watt*, 1833, 11 S. 999; *M'Gill* v. *Ferrier*, 1837, 15 S. 882; *Carne* v. *Manuel*, 1851, 13 D. 1253.

[4] *Anderson* v. *Ormiston & Lorain*, 1750, Mor. 13949, 13955; *Jowett* v. *Woolley*, 1797, Hume 403.

[5] *Pearson* v. *Anderson*, 1833, 11 S. 1008; *Menzies* v. *Stevenson & Co.*, 1839, Macfarlane, 281; *Hunter* v. *Kerr*, 1842, 4 D. 1175.

[6] *Hunter* v. *Kerr*, *supra*; *Bisset* v. *Whitson*, 1842, 5 D. 5; *Inglis* v. *M'Intyre*, 1861, 23 D. 1240; *Cook* v. *Wallace*, 1889, 16 R. 565.

[7] *Cowan* v. *Watt*, *supra*.

[8] *Henderson* v. *Rollo*, 1871, 10 M. 104.

[9] *Noble* v. *Mags. of Inverness*, 1825, 3 S. (N.E.) 358; *Cowan* v. *Farnie*, 1836, 14 S. 634; *Robertson* v. *Ross*, 1873, 11 M. 910; *Bryce* v. *Graham*, 1826, 2 W. & S. 481; 1828, 3 W. & S. 323; but see *Stewart* v. *Auchtergaven and Logiebride Locality*, 1882, 19 S.L.R. 449.

[10] *Miller* v. *Rae*, 1834, 13 S. 699.

[11] *M'Kechnie* v. *Halliday*, 1856, 18 D. 659. See also EXPENSES, *sub voce Dominus litis*, Vol. VI. p. 582, *ante*.

99. A law agent who enters into a contract in his own name is personally bound, though entitled to relief from his client for all obligations properly undertaken on the latter's behalf.[4] A law agent who gives a distinct guarantee for a client is, of course, personally liable.[5] A law agent is, of course, personally liable to persons whom he has employed on his own credit, and he is presumed to have so employed printers [6] and accountants in extrajudicial work.[7] He is also liable for such fees and charges as are generally disbursed by law agents, such as fees of officers of Court, the expenses of witnesses and havers adduced by him, fees of advocates' clerks, fees of commissioners and their clerks.[8] In the Sheriff Court agents acting for parties on the poor roll are not liable for the charges of witnesses, sheriff-clerks, shorthand writers, sheriff or bar officers.[9] Law agents are not now liable to persons to whom the Court has made remits in judicial proceedings.[10]

SECTION 14.—DISABILITIES OF LAW AGENTS.

100. The fiduciary character of the relation of agent and client imposes various disabilities on law agents as regards contracts with their clients, as regards gifts or bequests by clients, and also as regards transactions between law agents and third parties.

101. As regards contracts with clients, a law agent who is not acting as the legal adviser of a party *in hac re* is not disqualified from transacting with him, but is bound to shew that he gave fair value and withheld no information.[11] The only safe course, however, for a law agent who proposes to transact with a client, is to see that the client's interests are committed to the charge of another and independent law agent, and to supply the latter with all the information that he himself possesses.[1] A law agent is not precluded from taking security for the amount of his business accounts and cash advances.[2] When a person either occupies the position of a trustee for sale, or is the law agent of such trustee, he is absolutely disqualified from purchasing.[3] A law agent who has been instructed by a client to find a purchaser for the latter's property is not entitled without the express authority of the client to become the purchaser himself, unless the law agent has so divested himself of the character of agent for sale as to be dealing with the client "at arm's length."[4]

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[1] *Rankin* v. *Mollison*, 1738, Mor. 4064; *Maxton* v. *M'Intosh's Crs.*, 1777, 5 Bro. Supp. 441; *Bank of Scotland* v. *Watson*, 1813, 1 Dow 40; *King* v. *Shirra*, 1827, 5 S. (N.E.) 215; *Livingston* v. *Johnson*, 1830, 8 S. 594; *Glassford* v. *Brown*, 1830, 9 S. 105; *Russel* v. *M'Farlane*, 1837, 15 S. 989.

[2] 45 & 46 Vict. c. 61, s. 26 (1).

[3] Bell, Com., M'L.'s ed., i. 541 n.

[4] *Sorley's Trs.* v. *Grahame*, 1832, 10 S. 319; *Edinburgh and Glasgow Bank* v. *Steele*, 1853, 25 Sc. Jur. 245; *Gordon's Trs.* v. *Earl of Fife's Exrs.*, 1862, 34 Sc. Jur. 232.

[5] *Gardiner's Exrx.* v. *Bennett*, 1839, 2 D. 155; *Woodside* v. *Cuthbertson*, 1848, 10 D. 604; *Thomson* v. *Dudgeon*, 1851, 13 D. 1029; *Morrison* v. *Harkness*, 1870, 9 M. 35.

[6] *Neill & Co.* v. *Hopkirk*, 1850, 12 D. 618.

[7] *Hutcheon* v. *Scott*, 1831, 9 S. 511; *Scott* v. *Marshall*, 1847, 10 D. 226.

[8] Mackay, Practice, ii. 570.

[9] A.S., 4th December 1878, s. 13.

[10] A.S., 15th July 1876, s. 7; A.S., 4th December 1878, s. 12.

[11] *Hotchkis & Tytler* v. *Dickson*, 1820, 2 Bli. 303; *Aberdeen Rly. Co.* v. *Blaikie*, 1854, I Macq. 461; *Aberdein* v. *Stratton's Trs.*, 1867, 5 M. 726; *M'Pherson's Trs.* v. *Watt*, 1877, 5 R. (H.L.) 9; *Cleland* v. *Morrison*, 1878, 6 R. 156; *Gillespie & Sons* v. *Gardner*, 1909 S.C. 1053; *Aitken* v. *Campbell's Trs.*, 1909 S.C. 1217; *Allison* v. *Clayhills*, 1908, 97 L.T. 709.

102. A law agent ought not to request or accept any gift or gratuity from a client beyond his fair professional charges. In no case have our Courts sustained such gifts, while in several cases they have set them aside.[5] A testamentary bequest is not invalidated by the mere fact that it confers a benefit on the law agent who has drawn the will,[6] but the onus is on him to shew that the making of the deed was the free and uninfluenced act of the testator, deliberately entertained, and carried through with an entire knowledge of its effects.[7] The general principle that a law agent is not entitled to make any gain or profit at the expense of a client is applicable also to transactions between agents and third parties.[8] He is thus bound to credit his client with all discounts or commissions he may receive from persons employed on behalf of the client.[9]

Section 15.—Summary Proceedings against Law Agents.

103. Law agents are amenable at common law to the summary jurisdiction and control of the judges before whom they practise, a sentence pronounced by an inferior judge being, however, subject to the review of the Court of Session.[10] That Court has also jurisdiction to deprive a notary public of his office on the ground of delinquency.[11] The

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[1] See opinion of Lord Gordon in *M'Pherson's Trs.* v. *Watt*, 1877, 5 R. (H.L.) 9.

[2] *Walker's Exrx.* v. *Low's Trs.*, 1833, 12 S. 44; *Fraser* v. *Dunbar*, 1839, 1 D. 882; *Walker* v. *Wedderspoon*, 1843, 2 Bell's App. 57; *Hawarden* v. *Dunlop*, 1861, 23 D. 923.

[3] *York Buildings Co.* v. *Mackenzie*, 1795, 3 Pat. 378; *Aberdeen Rly. Co.* v. *Blaikie*, 1854, 1 Macq. 461; *Thorburn* v. *Martin*, 1853, 15 D. 845; *Mags. of Aberdeen* v. *University of Aberdeen*, 1877, 4 R. (H.L.) 48.

[4] *Gourlay's Trs.* v. *Kerr*, 1856, 18 D. 619; 1857, 19 D. 135; *Cunningham* v. *Lee*, 1874, 2 R. 83; *Gibson* v. *Jeyes*, 1801, 6 Ves. 266.

[5] *Long* v. *Taylor*, 1821, 1 S. (N.E.) 59; *Anstruther* v. *Wilkie*, 1856, 18 D. 405; *Anderson* v. *Turner*, 1884, 12 R. 1097, and footnote; *Logan's Trs.* v. *Reid*, 1885, 12 R. 1094; cf. *Wright* v. *Carter*, [1903] 1 Ch. 27.

[6] *Rooney* v. *Cormack*, 1895, 22 R. 761.

[7] *Grieve* v. *Cunningham*, 1869, 8 M. 317; *Weir* v. *Grace*, 1899, 2 F. (H.L.) 30; *Rigg's Exrx.* v. *Urquhart*, 1902, 10 S.L.T. 503; *Stewart* v. *Maclaren*, 1920 S.C. (H.L.) 148; see also *Ross* v. *Gosselin's Exrs.*, 1926 S.C. 325.

[8] *Grieve* v. *Cunningham*, 1869, 8 M. 317; *Cleland* v. *Morrison*, 1878, 6 R. 156.

[9] *Ronaldson* v. *Drummond & Reid*, 1881, 8 R. 956.

[10] *Munro* v. *Matheson*, 1877, 5 R. 308; *Broatch*, 1878, 5 R. 702.

[11] *Incorporated Society of Law Agents* v. *Laing*, 1893, 21 R. 267.

Law Agents Act of 1873 expressly provides[1] that in any complaint which may be made against a law agent for misconduct as such, it shall be lawful for either Division of the Court of Session to deal summarily with such complaint, and to do therein as shall be just, and also[2] to strike the name of any person off the rolls of law agents, upon application duly made, and after hearing parties, or giving them an opportunity of being heard. The application may be made by the delinquent himself, in which case it should be in writing, and addressed to the Lord President or the Keepers of the Rolls.[3] It is usually made by the Scottish Law Agents Society, or by the society of which the delinquent is a member.[4] Where the delinquent has neither been convicted nor fugitated proof of his delinquencies must be led.[5] Conduct which warrants expulsion from a society is, however, not necessarily sufficient to justify striking off the rolls.[6] The striking of a law agent's name off the rolls does not necessarily create a perpetual disability to practise, for after some time his name may be restored if his subsequent conduct proves him to be deserving of lenity. Where a law agent was held guilty of misconduct in respect of failure to discharge his duty to take ordinary measures to satisfy himself that a claim of damages which he brought to Court was genuine, the Court suspended him for a year.[7]

104. A summary petition may be presented against a law agent for the delivery of documents improperly retained by him,[8] or for money belonging to a client and improperly retained by the agent.[9] A summary petition may also be brought for taxation of a law agent's account.[10]

SECTION 16.—PARTNERSHIPS.

105. Law agents may, of course, enter into partnerships, and the rights and liabilities thence arising do not differ much from those which characterise other partnerships. The restrictions already mentioned under the heads of "Certificate or Licence to Practise" and "Unqualified Practitioners" have the practical effect of making it necessary for every member of the partnership to be an enrolled law agent or a notary public;[11] but a share of the profits may be given to a managing clerk, or to the widow and children of a deceased partner, without making such persons partners.[1] What is sufficient to infer a partnership depends upon the special circumstances of each case.[2] Although it is usual for each partner to have his own separate clients, the client's mandate or retainer is deemed to be given to the partnership; and any disqualification of one partner affects all the partners.[3] On the other hand, the partnership is liable on contracts made by one partner in the usual course of the business of law agents,[4] and similarly all the partners are liable to their clients for the negligence or want of professional skill of any one of them,[5] and also to third parties for wrongful acts within the scope of his agency,[6] notwithstanding the dissolution of a partnership.[7]

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[1] 36 & 37 Vict. c. 63 s. 22.

[2] Sec. 14; see also s. 11.

[3] *Incorporated Society of Law Agents* v. *Purves*, 1897, 24 R. 394.

[4] *Glasgow Procurators* v. *Colquhoun*, 1900, 2 F. 1192; *Society of Solicitors of Elginshire, Petrs.*, 1881, 18 S.L.R. 303; *Aberdeen Society of Solicitors* v. *Sim*, 1897, 24 R. 511.

[5] *Aberdeen Society of Solicitors* v. *Sim*, *supra*.

[6] *S.S.C. Society* v. *Clark*, 1886, 13 R. 1170; *S.S.C. Society* v. *Pennell*, 1927 S.C. 280.

[7] *A. B.* v. *Incorporated Society of Law Agents*, 1895, 22 R. 877; *C. D.* v. *Incorporated Society of Law Agents*, 1901, 4 F. 4; *Writers to the Signet* v. *Mackersy*, 1924 S.C. 776.

[8] *Fenwick* v. *Dow*, 1826, 4 S. (N.E.) 500; *Ritchie* v. *Wilson*, 1828, 6 S. 552; *Burnet* v. *Morrow*, 1864, 2 M. 929; *Marshall* v. *Molison*, 1864, 3 M. 191.

[9] *Fenwick* v. *Dow*, *supra*; *Scott* v. *A. B.*, 1836, 14 S. 682; *Graham* v. *Lang*, 1850, 12 D. 754; *Hendry* v. *Grant & Jameson*, 1868, 5 S.L.R. 544.

[10] See para. 79, *supra*.

[11] *Rutherford* v. *Thyne*, 1907 S.C. 84.

106. It was formerly illegal for a law agent to enter into any agreement to participate with another agent in the profits of litigation in a Court in which he himself was not entitled to practise. But s. 21 of the Law Agents Act of 1873 enacts that "agreements between law agents acting for the same client to share fees or profits shall be lawful," so that a practitioner in the Sheriff Court may now participate in the profits of litigation in the Court of Session, without having paid the stamp duty exigible on admission to practise in that Court, and without having an Edinburgh certificate or licence to practise. Whether he is now responsible for the Edinburgh agent's negligence or misconduct within the limits of the latter's authority has not yet been decided. It is still illegal for a law agent to participate in the fees of a public officer, such as a messenger-at-arms.[8] Sec. 21 of the Law Agents Act further enacts that "a law agent authorised and acting for a client whom he discloses shall incur no liability to any other law agent employed by him, except such as he shall expressly undertake in writing." The English rule is different, but it has been held not to apply to a Scottish law agent employing an English solicitor on behalf of a client whom he discloses.[9]

SECTION 17.—APPRENTICES AND CLERKS.

107. Apprentices are not bound, without their own consent, on the death or retirement of their master, to serve with his successors. To prevent the premature termination of an indenture by the death or retirement of a single partner of a legal copartnery, law apprentices to such a copartnery are generally bound to the individual partners as well as to the firm.[1] As regards return of premium or apprentice fee, when an indenture is terminated prematurely by the death of the master, his executors must repay a proportion thereof, the amount of which, however, will not necessarily correspond with the period of unexpired apprenticeship, as the services of an apprentice generally become more valuable towards their close.[2] When the master retires from business, the matter is usually arranged by his assigning the indenture, with the apprentice's consent, to another qualified master, on such pecuniary terms as may be agreed. On the death or desertion of the apprentice the master is entitled to retain the whole premium or fee.

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[1] 28 & 29 Vict. c. 86, ss. 2 and 3.

[2] *Morrison* v. *Service*, 1879, 6 R. 1158.

[3] *Mitchell* v. *Burness*, 1878, 5 R. 1124; see also, as to Justices of the Peace, 6 Geo. IV. c. 48, s. 27, and 19 & 20 Vict. c. 48, s. 4.

[4] *Neill & Co.* v. *Hopkirk*, 1850, 12 D. 618.

[5] *Slater* v. *Henderson & Scott*, 1822, 1 S. (N.E.) 229; *Graham* v. *Hunter's Trs.*, 1831, 9 S. 543; *Ronaldson* v. *Drummond & Reid*, 1881, 8 R. 767; *Tully* v. *Ingram*, 1891, 19 R. 65.

[6] *Brown* v. *Cuthill*, 1828, 4 Mur. 474; *M'Farlane* v. *Donaldson*, 1835, 13 S. 725; *Tendring Hundred Waterworks Co.* v. *Jones*, [1903] 2 Ch. 615; *Palmer* v. *S.*, 1907, 51 Sol. J. 653; *New Mining and Exploring Syndicate, Ltd.* v. *Chalmers & Hunter*, 1912 S.C. 126.

[7] *Beveridge* v. *Forbes, Bryson & Carrick*, 1897 (O.H.) 5 S.L.T. 115.

[8] *Henderson* v. *Mackay*, 1832, 11 S. 225.

[9] *Livesey* v. *Purdom & Sons*, 1894, 21 R. 911.

108. As regards clerks employed by law agents, they are, according to the general understanding and practice, hired only during pleasure; but a clerk engaged at a yearly salary will probably be entitled to a reasonable notice of dismissal, to afford him a fair opportunity of getting another situation.[3] Remuneration for extra services may sometimes be due to a clerk.[4] A clerk has a limited preference for his salary or wages over the other creditors of his employers.[5]

109. A law agent is responsible for the acts of his apprentices and clerks within the scope of their employment, express or implied.[6]

SECTION 18.—SOCIETIES OF LAW AGENTS.

110. It is not now necessary for any law agent to become a member of any society or faculty of law agents (Law Agents Act of 1873, s. 15); and any such society may admit any enrolled law agent to be a member on such terms as it may see fit (ss. 19 and 20). The Writers to the Signet, however, still require an apprenticeship to a member of their society. There are a large number of societies of law agents, most of which were incorporated under the Procurators Act of 1865. The number of societies is at present twenty-eight (for information as to which reference may be made to the Scottish Law List),[7] besides the Scottish Law Agents Society, and the four leading societies already mentioned, viz. the Writers to the Signet, the Solicitors in the Supreme Courts, the Procurators in Glasgow, and the Advocates in Aberdeen.

SUBSECTION (1).—*The Society of Writers to the Signet.*

111. The origin of the Society of Writers to the Signet is not quite certain; but they seem to have at one time been clerks in the office of the Secretary of State, who had charge of the King's Seal. In the Act of Parliament instituting the Court of Session in 1532 they were mentioned as a previously existing body; and they were thereafter recognised as members of the College of Justice, as the new institution was then termed. The establishment of that Court must, however, have added considerably to their importance; for summonses and other writs requiring to be signeted were then substituted for brieves from Chancery, and those new writs were drawn and eventually required to be signed by Writers to the Signet. Being thus officially engaged at the initial stage of litigation, the members of the Society might naturally have been expected to act as solicitors in the Court of Session. But they were for a long time prohibited from doing so, by the injunction of the Secretary of State in 1594, by various Acts of Sederunt of the Court of Session, and by their own resolutions as late as the year 1696. Those prohibitions seem to have become obsolete at the beginning of the eighteenth century, and the right of members of the Society to conduct litigation in the Court of Session was expressly recognised by that Court in 1754. Since then the Writers to the Signet have formed the principal and most numerous body of solicitors in Scotland, and have held the highest rank in the profession. This honourable position has been to a large extent due to the very great attention which they have always paid to the education of their apprentices. The question has been mooted whether they form an incorporation. They do not possess any charter of incorporation; but they have frequently exercised the powers of a corporate body, and the better opinion is that they are by long custom an incorporation.[1]

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[1] *Hoey* v. *M'Ewan & Auld*, 1867, 5 M. 814; Fraser on Master and Servant, 3rd ed., pp. 123, 328, 362.

[2] Fraser on Master and Servant, 3rd ed., p. 367.

[3] *Campbell* v. *Fyfe*, 1851, 13 D. 1041; *Hoey* v. *M'Ewan & Auld*, *supra*; *Cameron* v. *Fletcher*, 1872, 10 M. 301.

[4] *Latham* v. *Edinburgh and Glasgow Rly. Co.*, 1866, 4 M. 1084.

[5] 38 & 39 Vict. c. 26, s. 3; 51 & 52 Vict. c. 62, s. 1 (*b*).

[6] *Galloway, Earl of*, v. *Grant*, 1857, 20 D. 230.

[7] See also Begg on Law Agents, 2nd ed., p. 370.

112. There are at present 551 members of the Society. The initial letters W.S. are generally used to designate a member. The office-bearers are a Keeper of the Signet, appointed by the Crown (whose office is now conjoined with that of Lord Clerk-Register), a Deputy Keeper, appointed by him and in use to act as chairman at meetings of the Society; the following officers who are elected annually, though generally reappointed until they have respectively held office for ten years or have attained the age of seventy, viz. Treasurer, Fiscal, Collector of the Widows' Fund, and Clerk; and the following officers who are appointed by the Keeper, viz. the Substitute Keeper of the Signet, and the Assistant Clerk and Extractor. Further, the Keeper names a considerable number of members as Commissioners to manage the affairs of the Society. The Professor of Conveyancing in the University of Edinburgh is appointed by two delegates chosen by the Society and other two chosen by the Town Council of Edinburgh, with the Deputy Keeper. The stated general meetings of the Society are held on the first Monday of February, the last Monday of May, the third Wednesday of June, and the third Monday of November.

113. In 1803 the Society obtained an Act of Parliament to enable them to raise a fund for the benefit of widows of members, and this Act was amended by subsequent Acts in 1818, 1831, 1836, and 1898. The fund is maintained by the entry money payable by intrants, by an annual rate of £6, 6s. from each member, and by certain additional rates levied on those who enter the Society after the age of twenty-four, and on marriages. The annuity to which each widow is entitled is at present £114. The actual amount of the fund at Whitsunday 1928 was £587,292, 15s. 4d. The library, founded in 1755, now numbers over 140,000 volumes, exclusive of pamphlets and tracts. It is kept up by the entrance fees of members. The lower hall of the library cost upwards of £12,000, and the upper hall was purchased from the Faculty of Advocates for £12,000. The Librarian is appointed during the pleasure of the Society.

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[1] Mackay, Practice, i. 128; *Writers to the Signet*, 1886, 14 R. 34.

114. No person can be admitted into the Society without having been apprenticed to a member of the Society. On account of the high standard of the examinations for admission to the Society, the Court of Session are in the habit of admitting as law agents, without further examination, all who have been admitted as members. The fees payable on entering into indenture amount to £345, 1s., and upon admission to the Society £137, 17s.

SUBSECTION (2).—*The Society of Solicitors in the Supreme Courts.*

115. It was not till the year 1754 that solicitors, as distinguished from advocates and their clerks, were officially recognised as entitled to practise in the Supreme Courts of Scotland. In 1797 the thirty-seven solicitors then practising obtained from the Crown a charter incorporating them and subsequent members of the Society into a corporation entitled "The Society of Solicitors in the Court of Session, Commission of Teinds, and High Court of Justiciary in Scotland." This charter was confirmed and amended by a private Act of Parliament, passed on 13th July 1871, which, *inter alia*, regulated the qualifications of candidates for admission, and reincorporated the Society under the name of "The Society of Solicitors in the Supreme Courts of Scotland." The Society has always required from applicants for admission high qualifications as regards both general knowledge and law; but it has taken advantage of the provisions of the Law Agents Act of 1873, s. 19, entitling it to admit enrolled law agents as after-mentioned. There are at present about three hundred members, and a very large part of the litigation in the Court of Session is conducted by them. The initial letters S.S.C. are generally used to designate members of the Society.

116. The office-bearers consist of a president, vice-president, treasurer, secretary, librarian, fiscal, and collector of the Widows' Fund. The same person may be appointed treasurer and collector. The affairs of the Society are managed by a council, consisting of the office-bearers and of seven ordinary members elected by the Society, two of whom go out of office in each year, two others being chosen in their stead. Three general meetings of the Society are held in each year, viz. on the first Tuesdays of March, June, and December. The office-bearers, four examiners, two censors, and two auditors are elected annually at the general meeting in June. The reporter on poor causes, the agents for the poor in civil and criminal causes, the commissioners for adjusting the rate of interest on heritable securities, and the representative on the Board of the Edinburgh Royal Infirmary are elected annually at the general meeting in December. The Society opened in 1892, on a site adjoining the Parliament House, their handsome library, including a hall for meetings of the Society and a suite of smaller rooms, at a cost of nearly £30,000. The collection of books, both in law and in general literature, is a most valuable one, consisting of about 30,000 volumes.

117. Enrolled law agents are eligible for admission to the Society, but no enrolled law agent shall be eligible who has been admitted as such in respect of his having been qualified subsequent to 14th August 1896 as a notary public. Applicants who have not passed the general knowledge examinations, or who do not possess one of the equivalents therefor, as provided for by the Acts of Sederunt of 18th March 1893, 12th July 1893, and 29th January 1895, shall undergo such examination as shall be prescribed by the Council. Applicants who have not passed the examination in law required by the Law Agents (Scotland) Act, 1873, the Law Agents and Notaries Public (Scotland) Act, 1891, and relative Acts of Sederunt, or who do not possess one of the equivalents therefor recognised by the said Acts, shall undergo such examination as shall be prescribed by the Council.

118. The rules of the Society prescribe the form of application. The applicant must be recommended by two members (not members of Council), who must state in writing their personal knowledge of his moral character, business qualifications, and professional conduct to the date of the application. The applicant's qualifications are inquired into by two examiners and subsequently by two censors, before whom he must appear, and after their reports have been considered by the Council, his admission is decided upon by ballot at a meeting of the Society. The dues payable by intrants on admission are £100, together with £35 of entry money to the Widows' Fund. The annual subsidy at present is fixed at £4, 4s. for town members and £2, 2s. for country members. The annual contribution to the Widows' Fund is £6, 6s.

SUBSECTION (3).—*The Faculty of Procurators in Glasgow.*

119. Although the first extant Minute Book of the Faculty of Procurators in Glasgow is dated 1668, it is obviously one of an already existing series, and there is reason to believe that in pre-Reformation days the legal practitioners in the Commissary Courts of the Archdiocese of Glasgow had formed a society or faculty, with special privileges granted by the Bishopric, and by usage came to be allowed to practise in all the Courts of Glasgow. Gradually they assumed the privilege of examining and admitting practitioners in those Courts, and excluding from practice all but the sons or apprentices of members. On 6th June 1796 they obtained a royal charter incorporating them under the name of "The Faculty of Procurators in Glasgow," confirming their exclusive privileges, prescribing the qualifications and mode of admission of candidates, and conferring the power to enact by-laws. The provisions of this charter came, however, to be in great measure superseded by the passing of the Law Agents Act of 1873, which abolished the exclusive privileges referred to, and allowed the Faculty to admit any enrolled law agent on such terms as they saw fit. This led to the Faculty obtaining, on 20th August 1897, a supplementary royal charter, under which, and under by-laws passed in virtue thereof, the affairs of the Faculty are now regulated.

120. When the first charter was obtained in 1796 there were 91 members; there are now 420. The office-bearers are a president (called Dean of Faculty), a council (consisting of the Dean, nine elective members, the ex-Deans, and the clerk and treasurer), a treasurer, a clerk, and a fiscal (which offices may be and are at present held by the same person), and an auditor of accounts. The officials include a librarian and an officer and keeper of the hall. Two stated meetings are held annually in the Faculty Buildings, on the first Thursdays of June and December, eleven members being a quorum. The election of office-bearers, committees, and officials takes place at the June meeting, at which also the treasurer's accounts are submitted for approval. Special general meetings are held as occasion requires. The library committee meet on the second Monday of each month during the year, with the exception of the months of May, August, and September. Meetings of the Bills Committee are held during the Parliamentary Session as may be required, and of the Court House Committee in June, December, and April, and as may be required.

121. The charter of 1897 authorises the Faculty at any time, and from time to time, in conjunction with the Society of Writers to the Signet, the Society of Solicitors in the Supreme Courts of Scotland, and the Incorporated Society of Law Agents in Scotland (now the Scottish Law Agents Society), to fix a scale of fees or remuneration to be charged from time to time by and to be enforceable at law by or against members of Faculty for conveyancing and general legal business in respect of which no scale of fees is fixed by law. It also empowers the Faculty to appoint an auditor or auditors for the taxation of the professional accounts of members of Faculty at the request of any persons interested in such accounts, and of the professional accounts of other persons practising in the law.

122. The Faculty elect representatives to the governing bodies of various public institutions in Glasgow. The Dean and six other members elected by the Faculty, together with five persons elected by other public bodies, act as governors of Baillie's Institution, founded by the late George Baillie, a member of the Faculty, to aid the self-culture of the operative classes in Glasgow. The Faculty have a valuable library, consisting of about 17,000 volumes of legal literature and 14,000 volumes of general literature, in the St. George's Place Library, and 1800 volumes of legal literature in the Court Library, County Buildings. The library funds have been amalgamated with the general funds of the Faculty since 1875. Law agents practising in Glasgow are admitted during the first five years of their practice to the privilege of consulting the library. A fund for the support of widows and children of members was formed soon after the date of the first royal charter; but a private Act of Parliament was obtained in 1875, declaring that no new contributor to the fund should be admitted, and making provisions for the final winding up of the fund. In a recent case it was held that while it was a condition of a person being admitted as a member of the Widows' Fund that he should be a member of the Faculty of Procurators, it was not a condition of the contract of insurance that he should continue to be a member of that Faculty during his life.[1] In 1913 a Benevolent Fund was instituted, under the control and management of the Council, the income thereof to be applied in making voluntary grants to or for indigent members of Faculty and to or for the widows, children, or other dependants of deceased members, preference being given to the claims of members who have contributed to the fund. The capital of the fund exceeds £7000, and the income thereof is augmented by voluntary annual subscriptions by members.

123. The funds of the Faculty, after paying all necessary charges, including those connected with the library and an annual sum of £105 towards the salary of the Professor of Conveyancing in Glasgow University, whose chair was originally endowed by the Faculty, are applied to the advancement and improvement of legal matters and the promotion of legal education in Scotland. Prizes are given annually in the classes of Scots Law, Conveyancing, Civil Law and Evidence and Procedure in the University of Glasgow. The total value of the funds and property is at present (1929) upwards of £58,000 (exclusive of the Benevolent Fund), including £33,000 as the estimated value of the Faculty's buildings, which comprehend a large hall in which most public sales of heritable property take place, a library hall, committee rooms, etc.

124. All enrolled law agents and advocates are eligible for admission, as are also English, Irish, and Colonial barristers and solicitors, including those who have voluntarily retired from practice, and also such persons of distinction connected with the legal profession as the Faculty may think fit to admit. Members are admitted by ballot. The fees payable on admission amount to £50 in full, but may be paid in eleven annual subscriptions, beginning with £10, 10s. for the first year and £5, 5s. thereafter.

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[1] *Colquhoun* v. *Society of Contributors to Widows' Fund of Faculty of Procurators in Glasgow*, 1908 S.C. (H.L.) 10; 1904, 7 F. 345.

SUBSECTION (4).—*The Society of Advocates in Aberdeen.*

125. The origin of this Society cannot now be precisely ascertained, but it appears that in 1633 the Sheriff of Aberdeen passed an Act of Court recognising sixteen practitioners as qualified to conduct judicial proceedings, and prohibiting all other persons from practising before him. The practitioners thus admitted seem to have held themselves entitled to control the examinations and admission of all future candidates. In 1685 the members then practising formed themselves into a regular Society, and a royal charter of incorporation was obtained in 1774, confirming all their former rights and privileges. Two other charters were subsequently obtained, in more comprehensive terms, in 1799 and 1862 respectively. In virtue of those charters, and of immemorial usage, the members of the Society were entitled to the exclusive privilege of practising in all the Courts within the city of Aberdeen, till the Law Agents Act of 1873 abolished all such exclusive privileges. The number of the members of the Society is at present 125; but besides these there are about 61 law agents practising in Aberdeen, as they are entitled to do under the Law Agents Act, without being members of the Society. The Society have erected a hall, containing a large and valuable library of books both in legal and in general literature. The whole funds and property of the Society amount to £162,000, of which £119,000 belong to a fund for the benefit of widows of members, each widow being entitled to an annuity of £100.

126. A very high standard of qualification has always been required by the Society from its apprentices. Every intending intrant is required to serve a regular apprenticeship, with a member of the Society, or any enrolled law agent, or partly with one and partly with the other, for five years, unless the intrant is a M.A. or a B.A., in which case three years are sufficient.

127. In order to be admitted a member of the Society it is not absolutely necessary that the applicant shall have been matriculated to the Society as above mentioned, provided he is not over 50 years of age, is an enrolled law agent, and is resident or practising his profession in the city of Aberdeen. The matriculation fee payable by apprentices is £10, 10s., and the entry money on their admission is £117, 12s. Extraneans require to pay £155, 4s. 6d. of entry money. There are extra payments to be made to the Widows' Fund where the intrant's age exceeds 25, and, on marriage, a marriage tax of £50, with the addition of an equalising sum for each year beyond one by which the member's age exceeds that of his wife. The annual contribution from members admitted after 15th October 1883 is £7.

SUBSECTION (5).—*The Scottish Law Agents Society.*

128. This Society is a general society, open to all enrolled law agents, all persons who have voluntarily retired from practising as enrolled law agents, and all notaries public.[1] It was constituted by Crown Charter dated 24th December 1883, under the name of The Incorporated Society of Law Agents, for two purposes, viz. to unite together the provincial law agents, whose union was endangered by the repeal of the Procurators Act of 1865 by the Law Agents Act of 1873, and to form ultimately a society including all law agents, metropolitan as well as provincial. In 1925 the name of the Society was altered to its present designation. For the direction and management of its concerns a council of twenty persons is elected from among the members, and a president and a vice-president are elected from the council annually. The annual general meeting is held in September. Every member of the Society pays 10s. 6d. as entry money, and 10s. 6d. as annual subscription, due on first January yearly. The Society has over 1700 members practising in all parts of Scotland.

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[1] 59 & 60 Vict. c. 47, s. 4.

LAWBURROWS.

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SECTION 1.—DEFINITION.

129. Lawburrows is an ancient form of process, still extant, by which anyone who has, or thinks he has, reason to apprehend danger from another, obliges the other to find caution not to trouble or molest him. The word "borrow" or "borgh" is an old word for caution.

SECTION 2.—PROCEDURE PRIOR TO 1882.

130. Previous to the Civil Imprisonment Act, 1882,[1] the warrant of lawburrows could be obtained either from the Court of Session or the Court of Justiciary, or from the Sheriff or any Justice of the Peace of the county in which the party to be restrained resided.[2] Where application was made to the Courts of Session or Justiciary, the letters were issued on bills being presented to the judges, and contained a warrant to charge the party complained of to give security within the days of charge that the complainer should be kept harmless from illegal violence. At first these letters were only granted for safety against bodily harm in the person of the complainer,[3] but their application was later extended[4] to harm done to the person or property of the complainer's family, servants, or tenants.

131. To obtain the letters it was, as a general rule, only necessary for the complainer to swear that he dreaded harm from the party complained of, citation or evidence in support of the complaint not being required;[5] but where the application was on behalf of one spouse against the other,[6] or of a parent against his child, or *vice versa*,[7] an order for previous service on the opposite party, and proof to support the complaint, was necessary. On the execution of the letters, the

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GENERAL AUTHORITIES.—Stair, i. 9, 30; Bankt. i. 282; Ersk. iv. 1, 16; Dove Wilson, Sheriff Court Practice, p. 444; Lewis, Sheriff Court Practice, 7th ed., pp. 163 *et seq.*, 409; Wallace, Sheriff Court Practice, pp. 455 *et seq.*; Fyfe, Sheriff Court Practice, s. 1208.

[1] 45 & 46 Vict. c. 42.

[2] See Act 1617, and Act 1661, c. 38.

[3] Act 1429, c. 129.

[4] Act 1581, c. 117.

[5] *Sellars* v. *Anderson*, 1778, Mor. 8042; *Earl of Cassillis* v. *Knockdoloan*, 1501, Mor. 8027; *Lord Thirlestane* v. *Hepburn*, 1612, Mor. 8030.

[6] *Calder, Petr.*, 1841, 13 Sc. Jur. 270.

[7] *Taylor* v. *Taylor*, 1829, 7 S. 794.

person complained of required to find caution within the days specified in the letters, and to lodge it with the Clerk in the Bill Chamber, who issued acertificate of the fact.[1] If caution was not found within the days specified, the letters might be followed by caption and imprisonment.[2]

Section 3.—Procedure since 1882.

132. By the Civil Imprisonment Act, 1882,[3] considerable alteration has been made in the procedure, and it is now no longer competent to issue letters of lawburrows under the Signet in the Courts of Session or Justiciary. Application must be made to the Sheriff or the Sheriff-Substitute, by initial writ, or to a Justice of the Peace, by a petition setting forth (in substance) the grounds of the apprehension which the applicant entertains, and concluding that the defender be bound to find caution for a specified sum, or for such sum as the Justice (or Sheriff) shall think right, not to molest the pursuer, on pain of imprisonment.

133. Upon the application being presented, the Justice of the Peace (or Sheriff) orders the petition to be served upon the person complained against, and grants warrant to both parties to cite witnesses for a diet named. At the diet of proof appointed, or at any adjourned diet, the application is disposed of summarily under the provisions of the Summary Jurisdiction (Scotland) Act, 1908,[4] without written pleadings or a record of the evidence. The parties are competent witnesses, and the prayer of the petition may be granted upon the sworn testimony of one credible witness, although such witness be a party.

134. The Court, if satisfied of the danger, ordains the defender to find caution or grant a bond within a stated time that he will not molest the pursuer, and failing such caution or bond being found or granted, the defender may be imprisoned for a period not exceeding six months. The amount of caution is in the discretion of the Court. Expenses may be awarded against either party, but there is no power to imprison the defender for non-payment of expenses, and these must be recovered as a civil debt. The respondent when in prison is treated as if imprisoned for contempt of Court, and the applicant is not bound to aliment him there. There is no right of appeal against a refusal of the application.[5] The proper method of review of a decree of lawburrows is now by stated case and not, as formerly, by suspension.[6]

Section 4.—By and against whom Action is Competent.

135. Lawburrows cannot be used against a pupil,[7] but a married woman has always been subject to lawburrows.[8] It has been held that a community might serve, or be served, with letters of lawburrows,[1] but in such a case the complainer must specify some act of the community as such in order to infer contravention.[2]

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[1] Bankt. i. 283.

[2] *Thomson, Petr.*, 7th March 1815, F.C.

[3] 45 & 46 Vict. c. 42, s. 6.

[4] 8 Edw. VII. c. 65.

[5] Dove Wilson, p. 446 ; Wallace, p. 456 ; Lewis, 7th ed., p. 163.

[6] *Mackenzie* v. *Maclennan*, 1916 S.C. 617.

[7] *Seytoun* v. *Ballingall*, 1532, Mor. 8023.

[8] See Bankt. i. 287 ; *Thomson, Petr.*, 7th March 1815, F.C.

SECTION 5.—CONTRAVENTION OF LAWBURROWS.

136. Contravention of lawburrows occurred where the party complained of did any violence to the complainer or his family after letters had been taken out, and the pursuer did not need to prove any damage accruing by the act of contravention.[2] The action for contravention, being penal, was brought at the instance of the public prosecutor of the Court whence the warrant was issued as well as of the private party, though, where the act was not sufficient to infer contravention, the party could insist in the same action for his damages.[3] Moreover, the offender could be prosecuted criminally at common law for the assault or breach of the peace.[4] Further, where several persons were charged with lawburrows, all who contravened were held liable severally and *in solidum* to the full penalties contained in the letters.[5]

137. The penalties of contravention were at first inflicted at the discretion of the Council, and the fine equally divided between the Crown and the party injured,[6] but they were afterwards fixed at precise sums, according to the quality of the defender, ranging from 2000 pounds Scots (£166, 13s.) for an earl or lord, to 100 merks Scots (£5, 11s. 1½d.) for a yeoman, including every person of lower degree.[7] The amount of the penalty was properly that stated in the bond, but sometimes, when the contravention was trifling, less was awarded than the actual damage. In this last case the amount levied went to the party injured.

138. Under the modern procedure the action of contravention of lawburrows is a civil action at the instance of the injured party, craving for forfeiture of the caution. The concurrence of the procurator-fiscal is required, and the cautioner, if any, should be called as a defender.[8] The action is excluded by the private party's forgiveness or passing from the offence; and in such a case the public has no concern in the penalty, though the breach of the peace may be prosecuted criminally.[9]

139. The uttering of reproachful words and mere threats of violence have been held not sufficient to infer the penalty of contravention,[10] as likewise have boasting and chasing without striking, or threats and knocking off a hat;[11] but a breach was held to have occurred where the party complained of pursued the other with a drawn sword, but did not strike therewith.[1] Averments of injurious words and spitting in the face were held relevant to infer contravention.[2] Violent entering into possession of land was held a contravention, and likewise where a sown field was ploughed up;[3] but the pasturage of cattle on another's ground without herding them thereon,[4] and letting water into a coal-pit,[5] were held not to be contraventions. Nor is contravention sustained upon any illegal deed where the matter of right is dubious.[6] Deeds done against servants are presumed to be on their master's account, and will infer contravention, unless the defender prove that it was on the servant's own account;[7] but not deeds done against tenants, unless it appear from the circumstances that they have been done on the heritor's account.[8]

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[1] *Old Town of Aberdeen* v. *New Town*, 1549, Mor. 8026.

[2] Bankt. i. 285.

[3] Bankt. i. 286; *Lord Wemyss* v. *Stuart*, 1633, Mor. 8037.

[4] *The King* v. *Crichton*, 1517, Mor. 8023; *Robertson* v. *Ross*, 1873, 45 Sc. Jur. 556; see Hutchison, Justice of Peace, ii. 2, s. 2, i. 404.

[5] Bankt. i. 284.

[6] Acts 1491, c. 27, and 1581, c. 117.

[7] Bankt. i. 283.

[8] Fyfe, Sheriff Court Practice, s. 1208.

[9] Bankt. i. 286; *Sheriff of Forrest* v. *Turnbull*, 1613, Mor. 7898.

[10] *Wallace* v. *Laird of Hayning*, 1604, Mor. 8027.

[11] *Constable of Dundee* v. *Flescheour*, 1605, Mor. 8028.

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[1] *M'Kie* v. *M'Kie*, 1607, Mor. 8029; cf. *Bruce* v. *Clackmanan*, 1609, Mor. 8030.

[2] *A.* v. *B.*, 1629, Mor. 8033.

[3] *Strangs* v. *Sandilands*, 1591, Mor. 8024; *Muirhead* v. *Laird of Barsinok*, 1616, Mor. 8031; *Laird of Whittingham* v. *The Lady*, 1631, Mor. 8034.

[4] *Shaw* v. *Wilkieson*, 1604, Mor. 8027; *Anderson* v. *Galbraith*, 1616, Mor. 8031.

[5] *Anderson* v. *Blackwood*, 1629, Mor. 8033.

[6] *Strangs* v. *Sandilands*, 1591, Mor. 8024; see *Brock* v. *Rankine*, 1874, 1 R. 991; Stair, i. 9, 30.

[7] Bankt. i. 284.

[8] *Grant* v. *Grant*, 1632, Mor. 8036; *Lindsay* v. *Denniston*, 1633, Mor. 8040.

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SECTION 1.—INTRODUCTION.

SUBSECTION (1).—*Definition.*

140. A tack or lease is a contract of location by which the use of land or any other immoveable subject is set to the lessee or tacksman in consideration of a determinate yearly rent or duty to be paid or performed to the lessor or landlord, either in money, the fruits of the ground, or services.[1] Leases were at first granted in the form of charters by the proprietor without any written obligation signed by the tenant. But because no deed which was not subscribed by himself could bind the tenant to his part of the bargain, they were afterwards drawn in the form of mutual contracts.[1]

141. Heritage in any form may be the subject-matter of a lease. The more common leases are those of land, buildings of all kinds, dwelling-houses, factories, mills, fishings, minerals, shooting rights. Questions have arisen as to whether a right of use of heritage, granted by its proprietor, is or is not a lease. Agreements allocating spaces to exhibitors and caterers in exhibition grounds in consideration of payments to the executive committee of the exhibition were held not to be leases.[2] On the other hand, an agreement between an hotel proprietor and a firm of billposters by which, for an annual payment of 10s. 6d., the former permitted the latter to affix advertisement boards to a part of the hotel, the permission to continue for three years and to be terminable on three months' notice, was held to be a lease.[3] The question may be as to whether the contract is a lease or a mere personal licence,[4] or a lease or sale,[5] or a lease or a contract of service with right to occupy heritage as an adjunct of the contract.[6] A contract by which the relationship of landlord and tenant is not truly created will not be treated as a lease, as, for example, where it is attempted to create a security over moveables remaining in the debtor's possession.[7]

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[1] Ersk. ii. 6, 20.

[2] *Popular Amusements, Ltd.* v. *Assessor of Edinburgh*, 1909 S.C. 645.

[3] *Wilson & Co.* v. *Assessor for Kincardineshire*, 1913 S.C. 704.

[4] *Inland Revenue* v. *Anderson*, 1922 S.C. 284; *Glasgow Tramway and Omnibus Co.* v. *Glasgow Corporation*, 1897, 24 R. 628, and 25 R. (H.L.) 77.

[5] *Ferguson* v. *Fyffe*, 1868, 6 S.L.R. 68; *Brand & Son* v. *Bell's Trs.*, 1872, 11 M. 42.

[6] *Dunbar's Trs.* v. *Bruce*, 1900, 3 F. 137.

[7] *Heritable Securities Investment Association* v. *Wingate & Co.'s Tr.*, 1880, 7 R. 1094.

SUBSECTION (2).—*Parties to a Lease.*

142. The parties to an ordinary lease are, on the one hand, the proprietor or landlord who is called the lessor, and, on the other hand, the tenant who is often referred to as the lessee. One who is himself the lessee may, by granting a sublease, become the lessor with the rights and obligations of a lessor in relation to the subtenant. The lessor must, as a general rule, be the proprietor, but he may be an administrator for the proprietor, as commissioner or attorney; or he may be one with limited ownership—a trustee, a judicial factor, a tutor, a heritable creditor in possession, or heir of entail in possession. The general rule of law is that an administrator's right to grant a lease is measured solely by the terms of his written mandate, and that a lease by a limited owner ends with the ownership, but this rule is subject to many statutory modifications.

SECTION 2.—CLASSIFICATION.

143. Leases generally may be classified from at least two different points of view: (1) Leases valid only against the granter and his heirs, and (2) leases valid against singular successors of the granter; or alternatively as leases which (1) may and (2) may not be recorded under the Registration of Leases Act, 1857.[1] It is not possible logically to adhere to these classifications. They impinge on each other. But the former rests on the application or non-application to a lease of the Act 1449, c. 18, and the latter on the application or otherwise of the Act of 1857.

SECTION 3.—CONSTITUTION OF LEASE.

144. The general rule is that a lease of heritage cannot be constituted save by writing, and that the writing must be probative.[2] The only true exception is that a lease, for a year or less, may be proved *pro ut de jure*.[3] An agreement, not reduced to writing, to enter into a lease for more than one year is subject to *locus pœnitentiæ*, so long as possession has not followed upon it. If possession has followed, the lease is then binding on both parties thereto, for one year, yet either party may bring the lease to an end on giving forty days' notice of intention to terminate, prior to the end of any year.[4]

145. Actual possession or other acts inferring *rei interventus* following upon an agreement embodied in an improbative writing or upon a verbal agreement will instruct a lease for a period of years. In such a case the contract may be proved either by the improbative writing or, where there is no writing, by the oath of party, and by proof of the facts and circumstances relied upon as inferring *rei interventus*. Where the existence of a lease for years is set up by these means, but the agreement proved is latent on some particular point, as, for example, the date of entry, extrinsic evidence is admissible to supply the defect.[1]

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[1] 20 & 21 Vict. c. 26.

[2] Ersk. iii. 2, 2.

[3] *Ibid.*; *Gibson* v. *Adams*, 1875, 3 R. 144.

[4] *Neill* v. *Earl of Cassillis*, 22nd November 1810, F.C.

146. If the contract has been proved *scripto*, or by oath of party, the facts and circumstances inferring *rei interventus* may be proved parole.[2] Verbal leases thus proved are valid only as against the granter and his heirs, not as against singular successors. A tested or holograph missive of lease for a period of years though not in form a lease, or a tested or holograph obligation to grant a lease, has the same effect as a formal lease. The nature of the informal writ which will be accepted as establishing a lease *scripto* and as opening up the way to a proof of possession and *rei interventus* varies with the circumstances of each case, and definite rules on the subject cannot be laid down.[3] The facts and circumstances relied on as inferring *rei interventus* must be unequivocally referable to a lease for a period of years, and not merely to a lease for one year.[4] Accordingly mere possession is not enough, for it may often be attributable to a lease for one year only. Possession may, however, be sufficient, if the landlord has delivered either a holograph or tested writ,[5] or in cases where a lease has expired, and improbative writings are founded on to establish a change in the terms of the lease, the question then being whether there is a new lease, or merely tacit relocation.[6] An offer to prove a *nudum pactum* for a lease for more than a year, either by an informal writing, or by oath of party, is incompetent. The circumstances which will infer *rei interventus* vary with each case, but the most usual case is that of a tenant, in the knowledge of the landlord, making alterations on the subjects inconsistent with possession for one year only.[7]

147. On general principle a parole proof will not be allowed to establish either an alteration of a written lease, or a bargain inconsistent with the terms of a written lease, whether it be in amplification or modification of these terms. Further, the proof of *rei interventus* will not be allowed to contradict the terms of an informal writ founded on.[8] An authoritative opinion has been stated to the effect that a lease may be modified by proof of a universal and clear custom on a matter about which the lease is silent.[9] A presumption in favour of the existence of a tenancy may arise from the mere occupation of lettable subjects.[1] Moreover, the retention for a prolonged period by the landlord of a formal lease signed by the tenant implies the landlord's acceptance of the lease without proof of *rei interventus*.[2] If tenants possess even under a lease ultimately found to be invalid they may be found liable in damages for failure to implement it during the period of their occupancy.[3]

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[1] *Watters* v. *Hunter*, 1927 S.C. 310.

[2] *Walker* v. *Flint*, 1863, 1 M. 417 ; *Gowan's Trs.* v. *Carstairs*, 1862, 24 D. 1382 ; *Allan* v. *Gilchrist*, 1875, 2 R. 587.

[3] *Wight* v. *Newton*, 1911 S.C. 762 ; *Wares* v. *Duff-Dunbar's Trs.*, 1920 S.C. 5 ; *Sellar* v. *Aiton*, 1875, 2 R. 381 ; *Danish Dairy Co.* v. *Gillespie*, 1922 S.C. 656.

[4] Rankine on Leases, pp. 127 and 128 ; *Gardner* v. *Beresford's Trs.*, 1878, 5 R. 638 ; *Forbes* v. *Wilson*, 1873, 11 M. 454.

[5] Rankine on Leases, p. 128 ; *Fowlie* v. *M'Lean*, 1868, 6 M. 254.

[6] *Sinclair* v. *Weddell*, 1868, 5 S.L.R. 664 ; *Kirkpatrick* v. *Allanshaw Coal Co.*, 1880, 8 R. 327.

[7] *Philip* v. *Cumming's Exrs.*, 1869, 7 M. 859.

[8] *Carmichael* v. *Penny*, 1874, 11 S.L.R. 634 ; *Downie* v. *Laird & Sons* (O.H.), 1902, 10 S.L.T. 28.

[9] *Stewart* v. *Maclaine*, 1899 (H.L.), 37 S.L.R. 623, per Lord Shand ; *Buchanan* v. *Riddell*, 1900, 2 F. 544.

SECTION 4.—APPLICATION OF ACT 1449, C. 18.

SUBSECTION (1).—*General.*

148. Even written leases will be valid against singular successors only if these comply with the terms of the Act 1449, c. 18.[4] Although this statute bears to be for the "safetie and favour of the puir people that labours the ground," and specially refers to them, and "all otheres that has taken, or sall tak landes in time to come fra lordes," it has been held to apply not only to lands, but also to all heritages which are capable of being the subject of a separate lease. In particular it applies to houses, as well as to minerals, mills, and salmon fishings, but not to leases of the right to kill game.[5] It has been held that a lease of land for shooting purposes is good against singular successors.[6] The right to shoot game is, in general, a mere incident of property in land, and is incapable of being made the subject of separate ownership by infeftment. A subsidiary obligation in a lease enjoying the protection of the Act may not be binding on singular successors.[7] The Act does not apply to rights of a personal character as opposed to real rights, as, for example, to a lease of a right to uplift rents, or feu-duties, or casualties.[8]

SUBSECTION (2).—*Statutory Conditions.*

149. To enjoy the benefit of the statute the lease must comply with certain conditions, each of which is really a paraphrase of a statement in the statute itself: (*a*) the lease must be in writing, at any rate if it is for more than one year; (*b*) it must have a definite ish; (*c*) it must specify a definite consideration or rent, or maill, which need not be a money rent, but must be a real and not a nominal rent, in money, service, grain, or other fungible; (*d*) the tenant must have possessed—"sall tak landes," (*e*) the subject of the lease must be land or other *fundo annexum*.

(i) *Need for Writing.*

150. Verbal leases for a year or less prevail against singular successors of the granter, but not verbal leases for a period of years even though established by oath of party, plus possession, and *rei interventus*.[1] Otherwise the observations made on the constitution of leases generally apply to leases enjoying the benefit of the statute.[2]

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[1] *Glen* v. *Roy*, 1882, 10 R. 239.
[2] *Ballantine* v. *Stevenson*, 1881, 8 R. 959.
[3] *Eliott's Trs.* v. *Eliott*, 1894, 21 R. 858.
[4] Craigie's Conveyancing Statutes, p. 3.
[5] Rankine on Leases, p. 136.
[6] *Farquharson*, 1870, 9 M. 66.
[7] *Duncan* v. *Brooks*, 1894. 21 R. 760, per Lord Young; *Bisset* v. *Mags. of Aberdeen*, 1898, 1 F. 87.
[8] Rankine on Leases, p. 136; *Birkbeck* v. *Ross*, 1865, 4 M. 272.

(ii) *Endurance.*

151. As to the endurance of the lease, the statute applies however long the period may be, provided it is definite. A Crown lease of 1140 years was held good against singular successors.[3] Leases for 99 years, or 999 years, exclude resumption by a singular successor of the granter although not registered under the Registration of Leases Act, 1857.[4] Moreover, the ish may be treated as definite, although a period of years is not expressly stated, as in cases where the subjects were let for the lifetime of the granter of the lease, or other liferent.[5] Where a lease extended over two periods, the first of which was definite and the second indefinite, it was held valid, but only for the definite period.[6] A lease may be invalid against singular successors as not complying with the statute and yet be binding on the granter and his heirs. Thus a lease may be for ten years, and so long as grass grows and water runs, or until the granter of the lease has fulfilled to the grantee some obligation,[7] and be unchallengeable by the granter or his heirs. Moreover, a singular successor may, by the terms of the disposition in his favour, bind himself to warrant such a lease, or he may homologate it.[7]

(iii) *Definite Rent.*

152. Rent has been judicially treated as definite, although a specific sum is not mentioned in the lease, if a definite *quantum* of grain or other fungible is stipulated for, or even where the consideration is a service which the lessee is to perform for the lessor. The money value of the grain may depend upon the fiars prices of the year, or there may be other explicit means of ascertainment. A consideration has also been regarded as definite where the lease provided for the retention of the rent by the lessee till the fulfilment of an obligation of the lessor connected with the lease.[8] But this does not hold if the obligation is separate from and unconnected with the lease.[9]

(iv) *Possession.*

153. The statute operates in favour of a lessee only after he has taken possession of the subjects let.[10] Leases were originally constituted by charter and sasine, but now the only appropriate legal mode of perfecting a lessee's real right is by possession, just as a right in land is now completed by registration and an assignation of a moveable right by intimation. Thus preference is given to a lease on which possession has followed, against a lease, earlier in date, on which there has been no possession.[1] Possession does not avail unless it is the lessee's own possession and must be after the date of entry fixed by the lease. A lease, in which the date of entry is postponed, is not valid under the Act 1449 against a singular successor of the lessor who has completed title by infeftment between the date of the lease and the date of entry under it.[2]

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[1] Bell's Prin., s. 1187.

[2] *Wilson* v. *Mann*, 1876, 3 R. 527.

[3] *Lord Advocate* v. *Fraser*, 1762, 2 Pat. 66.

[4] Bell, Convey., p. 1210.

[5] *Thomson* v. *Thomson*, 1896, 24 R. 269.

[6] *Campbell* v. *M'Lean*, 1870, 8 M. (H.L.) 40.

[7] Bell's Prin., s. 1194.

[8] *Ibid.*, s. 1202,

[9] *Turner* v. *Nicolson*, 1835, 13 S. 633.

[10] Bell, Convey., p. 1211.

SECTION 5.—GRANTERS.

SUBSECTION (1).—*In General.*

154. Leases are almost invariably bilateral, although a unilateral grant may constitute a valid lease provided it embodies the essentials of a lease. The granter is usually described as heritable proprietor, because only an infeft proprietor may grant a valid lease.[3] Yet, if one uninfeft grants a lease and subsequently completes his title by infeftment, the lease already granted will be validated *accretione.* This rule applies generally to anyone having an uncompleted title, even to one having only a personal right by survivance under s. 9 of the Conveyancing Act, 1874. Accretion will not be pleadable by the lessee if the subjects let have been acquired by a person who does not legally represent the lessor. An heir is *eadem persona cum defuncto* and therefore cannot repudiate a lease granted by his ancestor while uninfeft, but a mid impediment may be created which prevents the operation of accretion. The lessor may die, or become bankrupt, before taking infeftment in the subjects leased, and the right of the lessee may be defeated by a singular successor, or a trustee in bankruptcy, or anyone not bound to represent the lessor.[4]

155. A lease binding on singular successors may be granted not only by a fee-simple proprietor, but by one having a limited title. A fee-simple proprietor's right to lease his heritage remains unaffected by his granting a bond and disposition in security, as the fee is still in the proprietor. Nothing short of a real transference of title will deprive a proprietor of right to grant a lease, valid in questions with third parties acting in good faith, unless the lease amounts to an alienation of the subjects, or is not granted in the ordinary course of administration. An inhibition, the purpose of which is to prevent an owner of heritage from alienating or burdening it with debt, does not render invalid a lease granted in ordinary course.[5] Nor does a decree by which lands are adjudged from the defender to the pursuer, the purpose of the registered notice of adjudication being to prevent alienation or burdening of the lands for debt.

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[1] *Ker* v. *Lord Ramsay*, 1620, Mor. 15227.

[2] *Johnston* v. *Cullen*, 1676, Mor. 15231.

[3] Bell's Prin., s. 1181.

[4] Rankine on Leases, pp. 47 and 48, and cases cited.

[5] *Ibid.*, p. 51.

156. Insolvency of the granter of a lease does not affect its validity if the lease is granted in ordinary course, and is not challengeable as an illegal preference. A trust deed for creditors duly intimated divests the granter of his estate, for the purposes of the trust, and the granter cannot thereafter grant a valid lease. A lease granted by an owner of heritage after the date of the first deliverance in a sequestration of his estates is invalid for reasons inherent in the law of judicial bankruptcy. Decree in an action of maills and duties transfers to a heritable creditor the right, under certain conditions, to grant leases of the security subjects; the debtor cannot after the decree validly do so.

Subsection (2).—*Particular Granters.*

(i) *Liferenter.*

157. A liferenter of heritage, whether by constitution or reservation, may have authority to grant leases of any duration conferred upon him by the writ conferring the liferent.[1] But such liferenter may, without such authority, grant a lease to cover the period of the liferent, and till the first term of Whitsunday occurring after his death.[2] The measure of a liferenter's right being no more than the full use and enjoyment of the subject liferented, a liferenter cannot confer, in a lease, any right, for example, to cut growing timber, except it may be for some purpose essential to the good management of the subject. Nor can he let minerals which are not being worked at the commencement of the liferent.[3]

(ii) *Married Woman.*

158. The Married Women's Property (Scotland) Act, 1881, did not affect a husband's *jus administrationis* in relation to the corpus of his wife's heritage. Accordingly a woman married, even after 18th July 1881, could not grant a lease of her heritage without the consent of her husband, unless his right of administration had been expressly excluded by marriage contract, or by the settlement under which she succeeded to the heritage. The Married Women's Property (Scotland) Act, 1920, which ends the curatorial right of every husband whose wife is *sui juris*, enabled a married woman to grant a lease of her heritage without any consent on any date after 23rd December 1920. The Act is not retrospective.[4] It was common, prior to the Act of 1920, when taking a conveyance of heritage to a married woman to make her husband a party consenter to the conveyance, and to embody therein a clause giving power to the disponee to grant leases of the subjects. Such a clause is now unnecessary.

(iii) *Trustees.*

159. At common law trustees are entitled to perform ordinary acts of administration. Included in such acts is the granting of a lease of ordinary duration, but a lease will take end, even sooner than the stipulated ish, if the trusteeship is sooner terminated.[1] Even at common law trustees were required to have regard to the intention and purpose of the creator of the trust. All trustees to whom the Trusts (Scotland) Acts prior to that of 1921 applied, had power to grant leases of the heritable estate of a duration not exceeding twenty-one years for agricultural lands, and thirty-one years for minerals.[2] It was also competent for the Court of Session, on the petition of trustees under any trust deed, to grant authority to trustees to grant long leases of the heritable estate or any part of it on being satisfied that such grant would be expedient for the execution of the trust, and not inconsistent with the intention thereof.[2] The powers conferred by ss. 2 and 3 of the Trusts (Scotland) Act, 1867, were declared by the statute to be exercisable only in consistency with the terms of the trust.[3]

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[1] 1491, c. 26.

[2] *Thomson* v. *Merston*, 1628, Mor. 8252.

[3] Rankine on Leases, p. 80.

[4] 10 & 11 Geo. V. c. 64, s. 1.

160. The powers of trustees in relation to the granting of leases were extended by the Trusts (Scotland) Act, 1921. Trustees were thereby empowered to grant leases of trust property of any duration, provided such leases are not at variance with the terms and purposes of the trust.[4] Even if the granting of a lease should be so at variance, it is competent for the Court of Session to sanction the granting of a lease if satisfied that it is expedient in the interest of the trust to do so, but this does not apply to a trust constituted by a private or local Act of Parliament.[5] After the passing of the 1921 Act doubts emerged as to whether the definition of trustee was wide enough to include a tutor or tutrix, either a father at common law or mother as tutrix of a pupil child under the Guardianship of Infants Act, 1886. In *Shearer's Tutor* [6] it was decided that the definition was not wide enough to include these; but the Guardianship of Infants Act, 1925,[7] with retrospective effect, declared that both father and mother as tutor and tutrix respectively are trustees for the purposes of the 1921 Act. In relation to leases by trustees, including a tutor, a *curator bonis*, or judicial factor, the question whether the grant is or is not at variance with the purposes of the trust must always be considered.[8]

(iv) *Fiduciary Fiar.*

161. A fiduciary fiar may, on an application to the Court of Session under the Trusts Act, 1921, have conferred on him all the powers of a trustee under that Act, or the Court may appoint trustees including the fiduciary fiar to administer the property held by them in trust.[9] The fiduciary fiar, or the trustees so appointed, may grant leases under the same conditions as an ordinary trustee.

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[1] *Wardlaw* v. *Campbell*, 1883, 10 R. (H.L.) 65.

[2] 30 & 31 Vict. c. 97, s. 2.

[3] *Ibid.*, s. 19.

[4] 11 & 12 Geo. V. c. 58, s. 4.

[5] *Ibid.*, s. 5.

[6] 1924 S.C. 445.

[7] 15 & 16 Geo. V. c. 45, s. 10.

[8] *Leslie's Judicial Factor*, 1925 S.C. 464.

[9] 11 & 12 Geo. V. c. 58, s. 8.

(v) *Bondholder in Possession.*

162. Till the passing of the Heritable Securities Act, 1894,[1] the position of a heritable creditor in possession in relation to the grant of a lease of the security subjects was uncertain. The view generally acted on was that such a creditor could not grant a lease for more than one year. But by that statute a heritable creditor in possession has now power to let the security subjects, or part thereof, for a period not exceeding seven years.[2] Further, it is provided by the same statute that the Sheriff of the county where the security subjects are situated may empower a creditor in possession to lease the security subjects for more than seven years, but the lease shall in no case exceed twenty-one years for heritable property in general, and thirty-one years for minerals.[3] It was thought that these provisions were available only to a creditor in possession under an action of maills and duties, but it is now settled that a creditor in possession merely with consent of the debtor may exercise these statutory powers.[4] A heritable creditor in possession is not *eadem persona* with the debtor in that he is not precluded from granting a lease of one part of the security subjects which conflicts with the provisions of an earlier lease of another part of the subjects granted by the debtor while still in possession.[4] The statute provides that the application to the Sheriff must set forth the name of the proposed tenant, the duration and conditions of the lease. It also provides for service of the application on the proprietor of the security subjects, and for such intimation and inquiry as the Sheriff may think proper. If satisfied that a lease for a longer duration than seven years is expedient, the Sheriff is to approve of the lease on the terms and conditions proposed, or on such modified conditions as may appear to him to be expedient.

(vi) Ex facie *Absolute Disponee.*

163. Such a disponee, though truly a security holder only, may grant a valid lease to anyone transacting with him in good faith.[5] On the other hand, one who has been infeft proprietor may grant a valid lease even after he has granted an *ex facie* absolute conveyance to his creditor, provided he remains in possession of the subjects conveyed and let. His own infeftment plus possession implies a mandate from the *ex facie* absolute disponee to grant a lease.[6] A trustee for creditors of the granter of such a disposition will not have transmitted to him, either by a trust deed in his favour or by an act and warrant, this implied mandate. Further, if, as frequently happens, one buys heritage and takes the title in favour of the lender, his—the buyer's—right to grant a lease, in respect of implied mandate resulting from possession, is doubtful. Such mandate as there may be will, in any event, lapse on the buyer's granting a trust deed for creditors.[1]

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[1] 57 & 58 Vict. c. 44.

[2] *Ibid.*, s. 6.

[3] *Ibid.*, s. 7.

[4] *Mackenzie* v. *Imlay's Trs.*, 1912 S.C. 685.

[5] Rankine on Leases, p. 50.

[6] *Abbott* v. *Mitchell*, 1870, 8 M. 791.

(vii) *Heir of Entail.*

164. Such an heir may, apart from express provision in the deed of entail, grant leases of the entailed lands of ordinary duration. If this power is exceeded by the heir in possession, an illegal alienation of the entailed estate has occurred, and the lease is voidable. The Montgomery Act,[2] the Rosebery Act,[3] the Rutherfurd Act,[4] and the Entail Amendment Act, 1882, all contain provisions relating to leases which may be granted by an heir of entail in possession. Generally, such a lease may be granted, at a fair rent, for a period not exceeding twenty-one years of agricultural lands, and of minerals for a period not exceeding thirty-one years. A grassum may not be paid by the tenant. A lease of mansion-house, or policies, or of the home farm of an estate, may not be granted for a period beyond the lifetime of the granter of the lease.[5] A lease of shootings over an entailed estate has been declared to be ineffectual after the death of the granter of the lease,[6] but that may be as much on a general consideration of the 1449 Act, as on any other ground. The general rule of law with regard to a permissible lease of land subject to the fetters of an entail is that the period must not be excessive, the rent must be fair, and a grassum must not be taken. If the rule is contravened in any particular, the lease will be reducible at the instance of a subsequent heir of entail.[7]

165. Questions have emerged as to whether obligations in leases, or agreements relative thereto, undertaken by an heir of entail, are binding on subsequent heirs of entail, or only on the personal representatives of the granter. If improvement obligations are such as could have been charged by the granter on the entailed lands, the subsequent heirs of entail are liable to implement the obligations.[8] On the other hand, such obligations as could not have been charged on the entailed lands by the granter thereof when the obligations became prestable, had the granter survived till then, are not enforceable against a succeeding heir in possession, but will be enforceable against the personal representatives of the granter of the obligations.[9] The distinction is illustrated in certain sheep stock cases.[10]

(viii) *Joint Proprietors.*

166. All the *pro indiviso* proprietors of a heritable subject must concur in the grant of a lease thereof. There is no room for the operation of *rei interventus* against one of two such proprietors, who was not a party to the letting of the subject.[1] The same principle is applied to an action of removing by joint proprietors.[2]

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[1] *Ritchie* v. *Scott*, 1899, 1 F. 728.
[2] 10 Geo. III. c. 51.
[3] 6 & 7 Will. IV. c. 42.
[4] 11 & 12 Vict. c. 36.
[5] Rosebery Act, *supra*.
[6] *Pollock Gilmour & Co.* v. *Harvey*, 1828, 6 S. 913.; *Birkbeck* v. *Ross*, 1865, 4 M. 272.
[7] Statutes cited, *supra*.
[8] 41 & 42 Vict. c. 28, ss. 1 and 2. See ENTAIL, Vol. VI. p. 195, *ante*.
[9] 41 & 42 Vict. c. 28, ss. 1 and 2.
[10] *Gardiners* v. *Stewart's Trs.*, 1908 S.C. 985; *Gillespie* v. *Riddell*, 1909 S.C. (H.L.) 3; *Riddell's Exrs.* v. *Milligan's Exrs.*, 1909 S.C. 1137.

SECTION 6.—LESSEES.

SUBSECTION (1).—*In General.*

167. A lease in common form bears that the lessor, in consideration of the rent "sets, and in tack and assedation lets," the subjects of the lease to the lessee, and it embodies, almost invariably, whatever may be the nature of the subjects let, an exclusion of assignees, whether legal or conventional, and of subtenants. If heirs are not expressly excluded, the lease will pass to the lessee's heir-at-law, whether or not there is an express destination to heirs, a lease being heritable *quoad* the succession of the lessee. Vesting in the heir takes place by mere survivance, without service or other procedure.[3] In agricultural leases there is frequently an express exclusion of heirs-portioners, and a declaration that the eldest heir-portioner is to succeed to the lease without division. In the absence of such exclusion heirs-portioners will succeed in intestacy to the lease in *pro indiviso* shares. The subject is further considered below.[4]

SUBSECTION (2)—Delectus personæ.

168. The doctrine of *delectus personæ* applies to a lease of agricultural subjects of normal duration. Such a lease cannot be assigned, and the subjects of the lease cannot be sublet without the lessor's consent.[5] This rule does not, *sub silentio*, exclude the lessee's heir, or a trustee in a sequestration of the tenant, whose act and warrant will in such a case attach a lease.[6] If there is no exclusion of assignees, there may be an adjudication of the lessee's right.[7] In the case of an agricultural lease for longer than the normal period of duration, if there is no clause expressly excluding assignees and subtenants, a power to assign or sublet will be implied.[8] Further, if in such a case the exclusion happens to be of assignees only, there will be no implied exclusion of subtenants.[9] There is no power at common law in any tenant to bequeath a lease. If there is an express exclusion of assignees and subtenants, it seems that even a destination to "heirs and successors," in the lease itself, will not support a *mortis causa* bequest of the lease.[10]

169. The rule of *delectus personæ* does not apply to leases of urban subjects, with the exception of houses let furnished, the ratio of the exception being that the contract is twofold, the letting of a house, and the hiring of furniture. The right to use furniture cannot be assigned, and the two contracts cannot be extricated.[1] If a lease of urban subjects contains no exclusion of assignees and subtenants, a power to assign or sublet is implied.[2] Yet it is usual to insert an exclusion of both in all such leases, and an exclusion will be enforceable in its terms. Variations in the clause are common, some clauses providing that assigning or subletting must be with consent of the lessor, which is not to be unreasonably withheld. If the prohibition is unqualified, the lessor may refuse to accept an assignee without giving any reason.[3] Clauses of exclusion are, however, strictly construed. The simple exclusion of assignees and subtenants will not exclude an assignation or sublease to the tenant's heir-at-law.

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[1] *Barr* v. *Turner* (O.H.), 1904, 12 S.L.T. 369.

[2] *Grozier* v. *Downie*, 1871, 9 M. 826.

[3] Rankine on Leases, p. 158.

[4] See para. 218, *infra*.

[5] Bell's Prin., s. 1219.

[6] *Alison* v. *Proudfoot*, 1788, Mor. 15290.

[7] *Cunningham* v. *Hamilton*, 1770, Mor. 10410.

[8] *Simson* v. *Gray*, 1794, Mor. 15294.

[9] *Trotter* v. *Dennis*, 1770, Mor. 15282.

[10] Rankine on Leases, p. 159.

SUBSECTION (3).—*Joint Tenants.*

170. If a lease is granted to two or more persons as joint tenants, each is liable *in solidum* for payment of the rent, and for due implement of the other tenant obligations. If one of the tenants dies, unless there is a destination to the survivor, the deceaser's interest in the lease passes to his heir-at-law. On the other hand, a lease may be granted to two tenants jointly, and the survivor of them. On the death of one, the lease passes to the surviving tenant.[4] When there is, in a lease in favour of two tenants, a joint and several obligation by both for payment of the rent and a destination to the survivor, the lease will pass to the survivor, but the representatives of the deceaser will be liable in payment of the rent.[5] If joint tenants have not bound themselves and their heirs, executors, and successors jointly and severally, and if the lease, by its terms, passes to the survivor of the joint tenants, the representatives of the deceaser will have no liability, save for arrears of rent at the date of death. By the law of Scotland it is presumed that the obligation to pay rent is only meant to attach to those persons who are, for the time being, in right of the lease as tenants.[6] If a tenant, who is bound along with his heirs, executors, and successors for payment of rent, assigns his lease with the consent of the lessor, the representatives are not bound to pay rent which becomes due after the assignee has entered into possession.[7] The addition of the words conjunctly and severally, in such a case, is to be regarded as implying that the tenant and his representatives are to continue liable along with those succeeding to the lease as assignees.[8] This rule seems to be derived, by analogy, from the case of a feu contract, where feuars and their heirs and successors are taken bound for payment of feu-duty conjunctly and severally.[9]

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[1] Rankine on Leases, p. 175.

[2] *Hatton* v. *Clay & M'Luckie*, 1865, 4 M. 263.

[3] *Marquis of Breadalbane* v. *Whitehead & Sons*, 1893, 21 R. 138.

[4] *Macalister* v. *Macalister*, 1859, 21 D. 560.

[5] *Burns* v. *Martin*, 1887, 14 R. (H.L.) 20.

[6] *Ibid.*, per Lord Watson at p. 24.

[7] *Skene* v. *Greenhill*, 1825, 4 S. 25.

[8] *Burns* v. *Martin*, *supra*.

[9] *Dundee Police Commrs.* v. *Straton*, 1884, 11 R. 586.

Subsection (4).—*Particular Lessees.*

(i) *Firm or Partnership.*

171. A firm may hold a lease *socio nomine.*[1] But this does not apply if the name of the firm is merely a descriptive one. The correct practice, even in the case of a firm where the title is not descriptive, is to take the lease in favour of the individual partners as trustees for the firm, and the survivors and survivor of the partners, and to take all bound, along with the firm, jointly and severally for the fulfilment of the obligations incumbent on lessees. The practice is consistent with the rule that an ordinary partnership or firm is incapable of sustaining the feudal relationship, that heritage is therefore vested in name of the partners as trustees, and that leases of heritage belonging to the firm are granted by the partners as such. In the case of a lease to a firm, or an unincorporated company, if assignees are excluded, the dissolution of the firm, or the sequestration of its estates, brings the lease to an end.[2] Moreover, a lease to the partners of a firm for themselves and future partners is not inconsistent with an exclusion of assignees. The death of one of the partners also ends a lease, unless there is a survivorship clause, for, in strict law, with the death of one partner, although the business may be continued under the same firm-name, the firm has become a new *persona*, and the lease has *ex hypothesi* been taken in name of certain persons as trustees for the former firm. One partner may bind his firm to take a lease of subjects appropriate to the partnership business, but one partner may not acquire for himself subjects held on lease by the firm or the partners as trustees for the firm, this being inconsistent with the *uberrima fides* required of partners. Should he do so, he will be held to be a trustee for himself and his copartners.

(ii) *Joint-stock Company.*

172. A lease may be granted to a company registered under the Companies Acts. On such a company going into liquidation the lease may be brought to an end by the lessor, even although there is no express exclusion of assignees, the liquidator being an administrator merely for the purposes of winding-up, and not a trustee in the sense of the Bankruptcy Acts.[3]

(iii) *Married Woman.*

173. A married woman is now entitled, she being *sui juris*, to enter into a lease of any kind.[4]

(iv) *Minor.*

174. A minor with or without curators may accept a lease subject to the same rules as apply to other contracts of minors.

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[1] *Dennistoun, Macnair & Co.* v. *M'Farlane*, 1808, Mor. App. "Tack." 15.

[2] *Walker* v. *M'Knight*, 1886, 13 R. 599.

[3] *Marquis of Breadalbane* v. *Whitehead & Sons*, 1893, 21 R. 138.

[4] 10 & 11 Geo. V. c. 64.

(v) *Trustees.*

175. The power of trustees to become lessees depends on the nature and purpose of the trust, regard being always had by them to their common law obligation to administer solely for the benefit of the trust. Trustees, whose chief duty it is to control and administer trust funds, are not entitled, at common law, or by statute, to enter into leases either of urban or agricultural subjects involving the investment of any part of the funds in furnishing, equipping, or stocking the subjects, unless express power is conferred on them by the writ constituting the trust.[1] But a power to enter into a lease, though not expressly conferred in the trust deed, may be implied from the existence of other powers. If, for example, trustees are empowered to carry on a testator's business, power to continue to hold the deceased's place of business on lease, or even power to take on lease other subjects clearly advantageous to the business would, it is thought, be implied.

SECTION 7.—DESCRIPTION OF SUBJECTS.

176. Parties to a lease may describe the subjects let in any way they choose. There are no *voces signatæ.* The only rule is: *dummodo constet de subjecta.* A farm is usually described by stating its name, that it lies in a certain parish and county, and that it is let as possessed by an immediate predecessor, whose name is given. If this form of description is adopted, the decisive measure of the lessee's right is the possession had by the predecessor, not only in respect of the extent of the ground, but also of subsidiary rights or privileges.[2] Should a dispute on this point emerge, parole evidence will be permitted for the purpose of settling it.[3] But parole evidence will not be permitted with a view to shewing the nature of the negotiations which took place before the execution of the lease, or what either of the parties intended, or understood to be included in the subjects let.[4] On the other hand, such words as "all as lately occupied by" may be construed not as restricting, but as explanatory of a right given by a lease.[5] An essential characteristic of every subject of lease is that the tenant or lessee is capable of being clothed with possession of the subject let. The only exception to this rule is a lease of teinds, which consisted of a right in the tacksman of the teinds to uplift the teindable corns. Such a lease is now unknown.

SECTION 8.—LESSORS' OBLIGATIONS.

SUBSECTION (1).—*To give Possession.*

177. The initial obligation of the lessor, apart from express bargain, is to give to the tenant full possession of the subject let [6] in good order and condition.[1] Thereafter the lessor's principal obligation is that of warrandice.

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[1] 11 & 12 Geo. V. c. 58, s. 10.

[2] *Galloway* v. *Cowden,* 1885, 12 R. 578.

[3] *Gregson* v. *Alsop,* 1897, 24 R. 1081.

[4] *Mackay* v. *Maclachlan* (O.H.), 1899, 7 S.L.T. 48.

[5] *Critchley* v. *Campbell,* 1884, 11 R. 475.

[6] *Tennent's Trs.* v. *Maxwell,* 1880, 17 S.L.R. 463.

SUBSECTION (2).—*Warrandice.*

178. The place of warranty in relation to the lessor's obligation to give possession in good order is clearly defined by Lord Dunedin in a modern case.[2] Warrandice is, in effect, a personal obligation by the lessor that the lessee will be maintained, throughout the period of the lease, in complete and undisturbed possession of the subject let, and that in the event of the lessee being evicted, either wholly or partially, the lessor will indemnify the lessee for the loss sustained by the latter through the eviction.[3] In form this warrandice may be expressed thus: "Which lease the lessor binds himself and his heirs and successors to warrant to the lessee and his foresaids at all hands." This absolute warrandice is frequently unexpressed in a lease, or may be found in older leases in such words as "I grant warrandice as effeirs." In either case the same warrandice is implied. It is, however, open to the parties to agree to the warrandice being modified in any way appropriate to the circumstances.

179. Total or partial eviction does not necessarily mean deprivation of the whole or a part of the subjects let, but may emerge on the tenant losing the full use of the subjects,[4] as where a lessee has two accesses to the subjects let to him, and is during the currency of the lease deprived of one of them, or where an agricultural tenant has taken a farm, as occupied by a predecessor, who has had the use of streams flowing through or bounding the farm as cattle waterings, and is deprived of these without fault on his part.[5] There is also an implied warranty of the fitness of the subjects let for the purpose for which they are let, but none that the premises will always remain fit for such purpose.[6] A landlord, in letting premises for a particular trade or business, does not warrant that he will abstain from entering into competition with his tenant in neighbouring premises.[7] Just as between disponer and disponee, so between lessor and lessee, warrandice does not infer an obligation *ad factum præstandum*, but an obligation to indemnify on eviction. But the lessee's loss on eviction is estimated over the whole period of the lease, although the estimate is made at the date of eviction.[8] The lessor is not liable for eviction resulting from an illegal act on the part of a stranger,[9] or of another tenant of the same lessor. The lessee is to be held as taking the risk of eviction from such causes, and to be bound to defend himself in possession: yet, one who has let subjects for a certain purpose may be liable to his tenant for the injury done to the latter by a third party, if action by the lessor may prevent or put a stop to the injury.[1] The lessee has also been held to take the risk of supervenient legislation.[2] If A. let to B. a dwelling-house prior to the passing of a Rent Restriction Act, and was by the Act prevented from giving possession, B. would have no claim of damages against A.

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[1] *Davidson* v. *Logan*, 1908 S.C. 350; *Reid* v. *Baird*, 1876, 4 R. 234.

[2] *Wolfson* v. *Forrester*, 1910 S.C. 675.

[3] *Menzies* v. *Whyte*, 1888, 15 R. 470.

[4] *Guthrie* v. *Shearer*, 1873, 1 R. 181.

[5] *Stewart* v. *Wand*, 1838, 16 S. 408; *Christie* v. *Wilson*, 1915 S.C. 645. See also on warrandice *Dougall* v. *Mags. of Dunfermline*, 1908 S.C. 151.

[6] *Glebe Sugar Refining Co.* v. *Paterson*, 1900, 2 F. 615; *Sandeman* v. *Duncan's Trs.*, 1897, 5 S.L.T. 21.

[7] *Craig* v. *Millar*, 1888, 15 R. 1005.

[8] *Cairns* v. *Howden*, 1870, 9 M. 284.

[9] *Lyons* v. *Anderson*, 1886, 13 R. 1020.

SUBSECTION (3).—*Game Damage.*

180. Questions as to a landlord's liability at common law for damage done to his tenant by game are akin to questions arising out of a lessor's warrandice. The tenant of agricultural subjects has no common law right to kill game found thereon, but he may kill rabbits.[3] This applies even to a tenant under a lease of 999 years. The true ground, at common law, of a claim for damages caused by game, seems to be not that the game is abundant, but that its abundance has been materially increased since the date of the lease, either by active measures of the landlord, or his failure to keep down the burden, which must be held as equivalent to landlord's act, as the right to keep it down is expressly withheld from the tenant.[4] The last statement gives a key to the position under a lease, and under the statutory rules affecting leases. See AGRICULTURAL HOLDINGS ACTS,[5] and GAME LAWS.[6]

SECTION 9.—LESSEE'S OBLIGATIONS.

SUBSECTION (1).—*Maintenance of Subjects.*

181. Apart from express stipulation in a lease, the landlord of agricultural subjects being bound at common law to put the buildings and fences into a tenantable state at the tenant's entry, and to provide buildings sufficient for the cultivation of the subjects let, the tenant, on the other hand, is impliedly bound to maintain the buildings and fences, and to leave them at his ish in the same tenantable condition as he received them.[7] These counter obligations are usually expressed in agricultural leases, with an addition to the effect that the tenant accepts the subjects as in good tenantable repair. Even so, the tenant is not bound during the currency or at the termination of a lease to repair extraordinary damage occasioned by a *damnum fatale*, or even by a storm of unusual or extraordinary violence.[8]

SUBSECTION (2).—*Fences.*

182. The lessee's obligation extends at common law to the upholding of the fences on the farm. Erskine draws a distinction between the case of ordinary fences and march fences. He refers to a case decided in 1813,[1] as indicating, with regard to ordinary fencing, that the lessor may not, the lease being silent on the subject, increase the amount of the ordinary fencing with the result that the tenant's obligation to maintain is augmented; and, with regard to a march fence, that as the lessor may be compelled by the neighbouring proprietor to erect a march fence, the lessee when he takes the farm knows, or must be held to have known, of the burden imposed on him by the Acts of 1661 and 1669 to the effect that when a march fence is erected he must preserve it. The tenant's common law obligation to maintain buildings is further qualified by the rule that he is not liable for the consequences of natural decay, nor for disrepair due to defective construction. In leases the tenant's liability is as a rule expressly modified by the words "fair tear and wear excepted." But, again, with regard to fences it seems that a lessee might be required to renew these, during the currency of a lease, even although the need to renew could be ascribed to fair tear and wear.[2] Even at common law a tenant of a farm had right to remove wire fences, wooden palings, and the like erected by him for his own convenience, and not in substitution for previous erection of a similar kind.[3] See BOUNDARIES AND FENCES.[4]

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[1] *Paton & Co.* v. *Hunter*, 1875, 12 S.L.R. 305.

[2] *Holliday* v. *Scott*, 1830, 8 S. 831; *Donald* v. *Leitch*, 1886, 13 R. 790.

[3] *Crawshay* v. *Duncan*, 1915 S.C. (J.) 64.

[4] *Wemyss* v. *Wilson*, 1847, 10 D. 194.

[5] Vol. I. p. 241, *ante*.

[6] Vol. VII. p. 402, *ante*.

[7] Ersk. Inst. ii. 6, 39.

[8] *York Building Co.* v. *Adams*, 1741, Mor. 10127.

SUBSECTION (3).—*Maintenance of Urban Subjects.*

183. The landlord of urban subjects, at common law, is held to warrant that such subjects will be put into a tenantable condition at entry, are fit for the purpose for which they are let, and, further, that he will uphold the subjects in tenantable condition during the currency of the lease. The tenant's correlative obligation is that he will not injure the subjects let by his fault or negligence.[5] In modern leases of urban subjects the tenant is almost invariably declared to have accepted the premises let as in good order, and is taken bound to keep them so during the currency of the lease. Even in the absence of the words "fair tear and wear excepted" the tenant will not be bound to make repairs or renewals resulting from natural decay, or a *damnum fatale*, or any incident of an extraordinary or unanticipated kind. The landlord will be liable in damages should he fail, in the absence of a protective stipulation in the lease, to fulfil this common law obligation. Yet it is the duty of the tenant to direct attention to any defect in the subjects let, emerging during the currency of the lease, as a condition precedent to the liability of the landlord in damages.[6] If a landlord is either expressly or by implication bound to make repairs and fails to do so the tenant may execute the repairs at his own hand and deduct the cost from his rent.[7] Even if a tenant has undertaken in a lease to execute the necessary repairs on a dwelling-house, the repairs may prove to be of so extensive a nature that the landlord will be bound to execute them, or at all events the tenant will not be bound to do so.

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[1] *Dudgeon* v. *Howden*, 23rd November 1813, F.C. 458.

[2] Rankine on Leases, p. 250.

[3] *Reid's Exrs.* v. *Reid*, 1890, 17 R. 519.

[4] Vol. II. p. 349, *ante*.

[5] *M'Lellan* v. *Kerr*, 1797, Mor. 10134.

[6] *Sandeman* v. *Duncan's Trs.*, 1897, 5 S.L.T. 21.

[7] Ersk. ii. 6, 43.

SUBSECTION (4).—*Obligations and Rights in relation to* Rei interitus.

184. The tenant's obligation under an agricultural lease expressing or implying the common law, or in a lease of an urban subject where the tenant has undertaken to repair and maintain the subject let, does not extend to the restoration of the subject let, in the event of its destruction. For *res perit suo domino.* This maxim has never been interpreted as implying an obligation on the lessor to rebuild in cases where the subject let has been destroyed by fire. On the contrary, it has been decided that the meaning of this maxim, where there is no fault anywhere, is that the thing perishes to all concerned, that all who are interested constitute the *dominus* for this purpose, and if there is no fault anywhere the loss must fall on all.[1] The lessee may, however, be entitled either to abandon the lease,[2] as he cannot enjoy the subject let, or to receive an allowance equal to the diminution in the value of the subject.[3] It seems to follow, if *rei interitus* results from the fault either of lessor or lessee, that the general rule is displaced and the loss falls on the party at fault.[4] The extent of the destruction of a subject which will justify abandonment of the lease is a question of circumstances.[5] In the case of a wine and spirit shop, or an hotel, it has been held that the loss of the licence does not necessarily constitute a *rei interitus* entitling the tenant to abandon the lease thereof.[6]

SUBSECTION (5).—*Circumstances equivalent to* Rei interitus.

185. A tenant may be entitled to abandon his lease in circumstances which do not amount to *rei interitus.* It has long been established that a lease of a house may be abandoned on account of vermin infesting it, or because it is unsanitary, on the general rule of *plus quam tolerabile.*[7]

SUBSECTION (6).—*Not to invert Possession.*

186. Ordinary leases are, as a rule, granted with a view to a particular type of possession, and to that only—a farm for agriculture, a garden for horticulture, a dwelling-house for occupation, a shop for trading. If the tenant trespasses beyond the limits thus generally, or by special covenant, laid down for his guidance, he is said to invert possession.[1] A tenant is not entitled to do so without the landlord's consent.[2] It has been held that a tenant cannot open an alehouse on a subject let as a farm, nor establish a factory in a subject let as a mill, nor erect a dwelling-house on ground intended as a flower-plot.[2] Such cases are clear, but questions of difficulty emerge in the interpretation of leases which do not expressly prohibit inversion, and in determining the circumstances from which inversion must be inferred. In this connection it should be noted that a lessee is entitled, there being no qualification in the lease, to the exclusive and reasonable use of the subject let for all purposes not contrary to or inconsistent with the general purpose of the lease. On this principle a landlord is not entitled to challenge the sale, in a shop, of goods different from the goods sold therein at the beginning of the lease,[3] nor even the occasional sale, by auction, of goods in a shop let for the purposes of retail trading.[4] It also seems to be no inversion of the possession of a dwelling-house to displenish the furniture therein by auction, that being a common incident in tenancies. The lessor's right to object to inversion is readily lost by acquiescence, from which consent may be inferred.[5]

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[1] *Drummond* v. *Hunter*, 1869, 7 M. 347 ; *Duff* v. *Fleming*, 1870, 8 M. 769 ; *Devon Iron Co.* v. *Earl of Mansfield*, 1839, 2 D. 268.

[2] Ersk. ii. 6, 39, note 118 ; *Muir* v. *M'Intyres*, 1887, 14 R. 470.

[3] Ersk. ii. 6, 39, note 118.

[4] *Kippen* v. *Oppenheim*, 1847, 10 D. 242.

[5] *Allan* v. *Markland*, 1882, 10 R. 383.

[6] *Donald* v. *Leitch*, 1886, 13 R. 790 ; *Hart's Trs.* v. *Arrol*, 1903, 6 F. 36.

[7] *Scottish Heritable Security Co.* v. *Granger*, 1881, 8 R. 459 ; *M'Kimmie's Trs.* v. *Armour*, 1899, 2 F. 156.

SUBSECTION (7).—*To Retain Possession.*

187. It is an implied obligation of a tenant under a lease to take and retain possession of the subjects let.[6] An action may be brought, even in the Sheriff Court, to compel a tenant to implement these obligations. But the true sanction is not specific implement of the obligation, but liability in damages. The measure of the damages which will be awarded to a lessor, on a tenant's failure to occupy a house or a shop let to him, is the dilapidation which follows on such premises being left without firing, airing, and reasonable care. It seems therefore that a tenant's duty, there being no express stipulation, is to prevent deterioration by negligence of the subject let, not necessarily, in the case of a house, to live in it, nor, in the case of a shop, to keep it open and do business in it.[7] In the case of an inn, however, a tenant has been found liable in damages for loss of custom and depreciation of goodwill through the inn being kept closed.[8]

SUBSECTION (8).—*To Plenish.*

188. The lessee of an urban subject is bound to bring sufficient plenishings into the subjects let to secure the due payment of the rent by him.[9]

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[1] Rankine on Leases, p. 236; *Leck* v. *Merryflats Patent Brick Co.*, 1868, 5 S.L.R. 619.

[2] Ersk. ii. 6, 39 n.

[3] *Gordon* v. *Crawford*, 1825, 4 S. 95.

[4] Ersk. ii. 6, 22; *Keith* v. *Reid*, 1870, 8 M. (H.L.) 110.

[5] *Ferguson* v. *Methven*, 1857, 19 D. 794; *Moore* v. *Munro*, 1896, 4 S.L.T. 172.

[6] Ersk. ii. 6, 39.

[7] *Smith* v. *Henderson*, 1897, 24 R. 1102.

[8] *Whitelaw* v. *Fulton*, 1871, 10 M. 27.

[9] *Mickel* v. *M'Coard*, 1913 S.C. 896.

SUBSECTION (9).—*To Stock a Farm, etc.*

189. In the case of an agricultural lease, the tenant is impliedly bound to stock the farm, to care for the buildings, and to cultivate the land *tanquam bonus vir.*[1] This obligation is not affected by recent legislation relating to freedom of cropping, and the like.

SUBSECTION (10).—*To Reside on a Farm.*

190. An agricultural lease usually contains a clause binding the tenant to reside on the subjects let. Moreover, this obligation is frequently fenced with an irritancy clause, but whether fenced with an irritancy clause or not, the lessor is entitled to an order on the tenant to fulfil the obligation, under pain of ejection and damages. It is said that this implied irritancy may be purged at the bar, but that the conventional irritancy may not.[2]

SUBSECTION (11).—*In relation to Fixtures.*

191. The rights of lessor and lessee, in relation to fixtures under an agricultural lease, are now regulated almost wholly by statute. This is not so in a lease of urban subjects. The attachment to buildings, by an urban lessee, of machinery, plant, appliances, or other fittings, for the better and fuller use of the subjects let, is still regulated by the common law. There is frequently a clause in a lease of such subjects, by which the tenant is permitted to make such attachments, and to remove them at the end of the lease, provided that he does so without causing damage to the structure, or it may be under an obligation to restore the building to the same condition as when the attachment was made. When such fittings are attached to heritage let, without express provision as to their fate at the end of the lease, a tenant is not entitled to require a landlord to take over any of these on the plea that the heritable subject has been meliorated thereby, unless the landlord has expressly bound himself to pay for meliorations. On the contrary, a tenant who has, without consent, erected buildings on ground, or made attachments to buildings, may be called upon efficiently to remove these at his own expense at the end of the lease.[3] Yet a tenant may so attach fittings to the subject of a lease, as not, on any account, to be entitled to remove them, if the removal cannot be effected without injury to the structure of the building, or even injury to the thing attached.[4]

192. When fixtures can be described as trade fixtures, that is to say, as things attached for the purposes of the lessee's trade or business, the right of the tenant to remove is very high, substantially higher than in the case of fixtures in a dwelling-house. Trade and other fittings, removable in a question between landlord and tenant, may, and generally will pass with the lease itself to the tenant's heir in heritage, as against his executor.[1] Until the passing of the Agricultural Holdings Act, 1883, a lessee of a farm was not regarded as a trader, and was not entitled to remove any buildings of a permanent character erected by him on the farm, nor to receive compensation therefor at the end of the tenancy. A nursery gardener on the contrary was always regarded as a trader, and was entitled to remove greenhouses, hot-house frames, etc. as trade fixtures.[2] See FIXTURES.[3]

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[1] Ersk. ii. 6, 39.

[2] Rankine on Leases, p. 235, and cases cited.

[3] *Andrew* v. *Morrison*, 19th January 1811, F.C. 152.

[4] *Dixon* v. *Fisher*, 1843, 5 D. 775.

SUBSECTION (12).—*Payment of Rent.*

(i) *Urban Subjects.*

193. Rent is defined as the stipulated annual return or consideration paid by the tenant to the landlord for the use and possession of the subjects, and for the produce derived from them.[4] Generally, it is paid in equal proportions at fixed terms, but payment in the form of a grassum does not deprive the payment of its legal quality as rent, a grassum being regarded as a proportion taken from each year's rent, and paid at one time by anticipation.[5] For urban subjects rent is generally paid, whether under a formal lease, or by a verbal let, half-yearly at Whitsunday and Martinmas. Payment of rent, without reservation, will as a general rule be held to infer an abandonment of a claim of damages which has finally emerged prior to the date when the rent becomes due. The rule has been strictly enforced with regard to penal rents expressly stipulated for in a lease.[6] Yet the rule may suffer exception if the damage is clearly cumulative, and complaints have been made to the landlord which he has failed to meet. Annual rents are payable, in the absence of express agreement, from 28th May to 28th May. *Invecta et illata* removed from urban subjects prior to 28th May in any year cannot, by any process, be made liable for the rent of the subsequent year.[7] The period for which rent is payable by agreement between landlord and tenant is immaterial, except in cases of small dwelling-houses within the meaning of the House Letting and Rating (Scotland) Act, 1911,[8] as amended. The effect of the date of payment of the rent of a small dwelling-house on the endurance of a let thereof will be considered later.[9]

(ii) *Arable Farms.*

194. Stipulations in agricultural leases with regard to the payment of rent must be framed and interpreted with strict regard to certain rules of law and practice affecting agricultural subjects in Scotland. At the outset a distinction between arable and pastoral farms must be noted. Arable farms are almost invariably leased from Martinmas to Martinmas, that is to say, from separation of crop to separation of crop. This is true even although the tenant takes entry to the houses, etc. at Whitsunday. The arable land is still in the possession of the outgoing tenant for the purpose of sowing and reaping his waygoing crop. Rents of arable farms are truly exigible not in respect of periods of time, but in respect of each crop and year. These rents are legally payable, as to the first half of any crop and year at Whitsunday after sowing, and as to the second half at Martinmas after reaping the crop. Payment of rent is often conventionally postponed. The rent is then said to be "backhand." If an arable farm is let with entry to the houses, etc. at Whitsunday, and to the arable lands at the separation of the crop from the ground, and the first rent is conventionally payable at Martinmas twelve months later, the rent is thus conventionally postponed not twelve, but six months only. At first sight, it seems that a tenant is enjoying a possession of the houses, etc. from the Whitsunday of his entry to the houses to the Martinmas of his entry to the arable farm, free of rent, but this apparent anomaly is rectified by his quitting the houses, etc. at a Whitsunday, yet continuing to pay rent till Martinmas after he has reaped his waygoing crop. This doctrine is fully discussed and explained by Lord Low in *Wigan* v. *Cripps*.[1] It is important in relation to the sale of estates consisting of farms let under leases.

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[1] *Brand's Trs.* v. *Brand's Trs.*, 1876, 3 R. (H.L.) 16; *Reid's Exrs.* v. *Reid*, 1890, 17 R. 519.

[2] *Duke of Buccleuch* v. *Tod's Trs.*, 1871, 9 M. 1014.

[3] Vol. V. p. 149, *ante*.

[4] *Syme* v. *Harvey*, 1861, 24 D. 202.

[5] Bell's Prin., s. 1230.

[6] *Emslie* v. *Young's Trs.*, 1894, 21 R. 710; *Baird* v. *Mount*, 1874, 2 R. 101.

[7] *Thomson* v. *Barclay*, 1883, 10 R. 694.

[8] 1 & 2 Geo. V. c. 53.

[9] See para. 208, *infra*.

(iii) *Pastoral Farms.*

195. Pastoral farms are generally let from Whitsunday to Whitsunday, and the rents thereof are legally payable as to the first half at Whitsunday on entry, on the theory that the subject of the lease is ready for the tenant's enjoyment, and as to the second half at Martinmas after the crop is consumed. In leases of pastoral farms, the rent is often conventionally postponed, so that the first half of the rent is made payable at Martinmas after entry. A question has been canvassed, and much difference in judicial opinion revealed, as to whether the rent of a pastoral farm, legally payable at the Whitsunday of entry, is really due in respect of a fictional possession had by the tenant prior to Whitsunday, while the crop which the tenant is to enjoy is coming to maturity, or in respect of the possession had by the tenant after Whitsunday of the crop then ready for consumption. The latter view prevailed in a case decided in 1915.[2] The question is again important in relation to the sale of an estate including pastoral farms. The words "I assign the rents" being the statutory form of assignation of rents in a disposition,[3] import an assignation to the purchaser of the rents to become due for the possession following the term of entry, according to the legal and not the conventional terms, unless in the case of forehand rents, in which case the rents carried to the purchaser are those payable at the conventional term following the term of entry.[1] In the case of a conveyance of a pastoral farm the rent of which was, by the lease thereof, conventionally postponed till the term of Martinmas following the Whitsunday of the tenant's entry, the rent payable at that Martinmas was held to fall to the purchaser, as being the rent to become due for the possession following the term of entry.[2] Rents of shootings and dwelling-houses accrue *de die in diem* and do not give rise to similar questions.[3]

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[1] 1908 S.C. 394. [2] *Baillie* v. *Fletcher*, 1915 S.C. 677. [3] 31 & 32 Vict. c. 101, s. 8.

SUBSECTION (13).—*Payment of Rates.*

196. Although usual, it is not necessary to insert in a lease a provision that the lessee is to be liable for taxes, rates, and assessments imposed by law upon tenants. Such an obligation is implied. On the other hand, the landlord of a furnished house is, by usage, bound to relieve his tenant of taxes due in respect of the tenant's occupation, in the absence of express stipulation to the contrary.[4]

SECTION 10.—MUTUALITY OF OBLIGATIONS.

197. If lessor or lessee fails, in any material particular, to perform his part of the mutual obligations in the lease, he cannot have the other ordained to implement a contract which he himself has breached.[5] Yet the intention of the parties when entering into the lease remains for consideration. Are the obligations so plainly correlative as to permit of the one being set-off against the other?[6] There was formerly a tendency to over-emphasise the lessee's obligation to pay the stipulated rent as a condition precedent to any challenge of the lessor's conduct in relation to obligations incumbent on him. It is no doubt a rule of law that a claim for a liquid debt cannot be countered by a claim which is illiquid, although the counter claim is illiquid only in the sense that its extent has not been exactly determined; but the tendency of more recent judicial opinion has been (first) to realise that rent, even although the term of payment has arrived, is not liquid in the sense that a sum due under a bond is liquid, just because rent is not exigible from the lessee unless the lessor has implemented all mutual obligations incumbent on him, and (second) to recognise the strict mutuality of all obligations arising under a lease, and to regard these as counterparts of each other.

198. The most notable result in relation to leases is the rule that even the rent cannot be demanded unless the tenant has been put in possession not only of the whole subjects, but the subjects as let to him.[7] In this view certain precedents may now be regarded of doubtful authority.[1] Earlier decisions are reviewed in a case arising out of a retention of rent following on the accidental destruction of the subjects let.[2] Even the simple principle has now been definitely enunciated, that a landlord's claim for rent is only good if he has fulfilled his part of the lease.[3] In other words, an averment that something short of full possession of the subjects has been given will be sufficient. For example, a tenant is entitled to withhold rent on an allegation that the landlord has failed to put buildings or fences into tenantable repair, if by the terms of the lease the landlord is bound to do so,[4] even without a further averment as to the amount required to fulfil the landlord's obligation, provided the failure is not merely nominal,[5] and the breach of the lease is explicitly averred in the tenant's defence.[6] The tenant may also counter-claim in the action for rent for the damage alleged to have been suffered.[7] Consignation of the rent may be ordered as a condition precedent to the tenant's proceeding with a defence, but an offer to consign is no answer if the claim to retain is not *ex facie* well founded. Moreover, there cannot be retention in respect of a claim of damages stated after repairs have been completed, even although failure timeously to execute is admitted.[8] The principle applicable to retention generally is explicitly stated by Lord Shand thus: "If the defence be founded on an obligation fairly arising out of the contract, and the performance is reciprocal to and contemporaneous with the obligation which is the foundation of the action, then the defence is good"[9] After the passing of the Sheriff Court Act, 1907, it was suggested that a tenant's claim to retain rent had thereby been extended,[10] but it has since been decided that this is not so.[8]

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[1] 31 & 32 Vict. c. 101, s. 8.

[2] *Baillie* v. *Fletcher*, 1915 S.C. 677.

[3] *Maxwell's Trs.* v. *Scott*, 1873, 1 R. 122; *Lord Glasgow's Trs.* v. *Clark*, 1889, 16 R. 545.

[4] *Macome* v. *Dickson*, 1868, 6 M. 898.

[5] *Turnbull* v. *M'Lean*, 1874, 1 R. 730.

[6] Rankine on Leases, p. 328.

[7] *Munro* v. *M'Geoghs*, 1888, 16 R. 93; *Sivright* v. *Lightbourne*, 1890, 17 R. 917; *M'Donald* v. *Kydd*, 1901, 3 F. 923.

SECTION 11.—HYPOTHEC.

199. With regard to the lessor's hypothec for rent, the right was abolished in 1880 in respect of the rent of land exceeding two acres in extent with the buildings thereon.[11] In the case of urban subjects the right still exists subject to certain exemptions in favour of the occupier of a small dwelling-house, as defined later, or any member of his family.[12]

SECTION 12.—IRRITANCIES.

SUBSECTION (1).—*In General.*

200. Leases are affected by certain legal or statutory irritancies, but they frequently express conventional irritancies instead of relying on those which are implied. Legal irritancies are associated with failure to pay rent for a period specified by the Act imposing the irritancy. The general rule of law with reference to such irritancies is that they may be purged before decree is pronounced in the action taken to enforce them.[1] Conventional irritancies in leases are, as in the case of feu-writs, frequently no more than expressions of appropriate and corresponding legal irritancies.[2]

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[1] *Drybrough* v. *Drybrough*, 1874, 1 R. 909.
[2] *Muir* v. *M'Intyres*, 1887, 14 R. 470.
[3] *Earl of Galloway* v. *M'Connell*, 1911 S.C. 846.
[4] *Sivright* v. *Lightbourne*, 1890, 17 R. 917; *Fingland & Mitchell* v. *Howie*, 1926 S.C. 319.
[5] *Humphrey* v. *Mackay*, 1883, 10 R. 647.
[6] *M'Donald* v. *Kydd*, 1901, 3 F. 923.
[7] *Fingland & Mitchell* v. *Howie, supra*; 7 Edw. VII. c. 51, First Schedule, Rule 55.
[8] *Christie* v. *Birrells*, 1910 S.C. 986.
[9] *Pegler* v. *Northern Agricultural Implement Co.*, 1877, 4 R. 435.
[10] 7 Edw. VII. c. 51, Schedule I., Rule 55.
[11] 43 Vict. c. 12, s. 1.
[12] 1 & 2 Geo. V. c. 53, s. 10.

SUBSECTION (2).—*Purging of Irritancies.*

201. Payment of rent as a general rule purges an irritancy, but an express declaration in a lease that failure to pay rent for two years will infer an irritancy, and that the irritancy will not be purgeable, has received effect.[3] The chief purpose of an irritancy clause in a lease is to enforce fulfilment of the contract. It has been said to follow that all irritancies are purged when the party in breach ceases to be so. The Courts, in older decisions, have shewn a tendency to exercise a benevolent discretion in favour of one who has incurred an irritancy. But in more recent times, irritancies, other than those incurred on failure to pay, have been regarded as under the rule that a party who has agreed to an irritancy must submit to its enforcement.[4] For example, irritancies emerging in terms of a lease on the bankruptcy or declared insolvency of the lessee are strictly enforced against the tenant. Yet the tenant must be given notice to terminate despite such a clause.[5] The purpose of such an irritancy is obviously to provide the landlord with power to end a contract with a tenant whose financial status has become unsatisfactory. The rule has been enforced in one case where, after admitted insolvency, the tenant had settled with his creditors,[6] in another case where an irritancy was, by the lease, incurred if the tenant's effects were sequestrated by the landlord, and again where assigning or subletting was declared by the lease to infer an irritancy, although the judgment in the last of these happened, on specialties, to be in favour of the tenant.

202. The enforcement of a conventional irritancy does not deprive the landlord of any remedies competent to him as a result of the breach. He may claim damages which follow on the breach. It is to be noted, however, that insolvency of the tenant may involve an irritancy, and yet not infer a breach of the lease which will render his trustee liable in damages.[7] It is to be noted also, that an irritancy may be regarded as conferring on the landlord an option, of which he may take advantage or not as he chooses, just as the imposition of a penalty on one party doing or omitting to do a certain thing does not permit his doing, or refraining from doing it, on paying the penalty.[8] And this is so whether the lease contains the words "by and attour performance," or the modern equivalent, "over and above performance." Further, the imposition of a penalty in a lease does not debar the party observing the terms of the lease from enforcing these by interdict.[1]

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[1] A. of S., 1756; 1911 Act, s. 5; Bell's Prin., s. 701.

[2] Act 1597, c. 250.

[3] *Earl of Elgin* v. *Whittaker*, 1901, 9 S.L.T. 375.

[4] *Waugh* v. *More Nisbett*, 1882, 19 S.L.R. 427.

[5] *Lyon* v. *Irvine*, 1873, 1 R. 512.

[6] *Tennent* v. *MacDonald*, 1836, 14 S. 976.

[7] *Bidoulac* v. *Sinclair's Tr.*, 1889, 17 R. 144.

[8] Bell's Prin., s. 34.

SECTION 13.—REMOVAL.

SUBSECTION (1).—*General.*

203. Removal from subjects let may be considered either as a right or an obligation—as a right in certain circumstances during the currency of a lease (already considered in relation to destruction or partial destruction of the subject), or as an obligation at the natural or earlier termination thereof. Removal in the latter sense has important specialties associated with legislation relating to farms and market-gardens, and to dwelling-houses, either under the House Letting and Rating Act or the Increase of Rent and Mortgage Interest (Restrictions) Acts. Removal may also be considered as a voluntary act expressed in a minute or deed of renunciation by the tenant.[2]

SUBSECTION (2).—*Notice of Removal.*

(i) *When required.*

204. Although a lease is for a definite period, or declared to terminate on a date expressly stated, notice of termination must be given by the lessor to the lessee, or *vice versa.* This rule applies even where the lease provides that the tenant is to remove at the termination of the lease without warning away or process of removal. There is a statutory exception to this rule. In leases of land exceeding two acres, if the tenant has granted an obligation to remove, either holograph of the tenant, or attested by one witness and dated within twelve months of the ish provided by the lease, or the first ish if there is more than one, notice by either party is unnecessary.[3] Notice must also be given if there is a break in a lease and advantage is to be taken of it by either party.[4] The obligation as to notice rests on both lessor and lessee. It is applicable to all lettable subjects, at all events if the lease is for a year or more. Yet there is a relaxation of the strict rule in the case of notice by a lessee of urban subjects. This notice must be for the full period, but may be informal, if clear.[5] A view has been expressed that the ordinary notice is required even to terminate the lease of a furnished house,[6] or a lease of apartments in a house. A notice is not required to terminate a seasonal let, as of shootings or fishings. Nor is it necessary to give notice of termination of tenancy to one who occupies a house as an accessory to a contract of service.[7]

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[1] *Gold* v. *Houldsworth*, 1870, 8 M. 1006.

[2] See para. 221, *infra.*

[3] Sheriff Courts Act, 1907, s. 35.

[4] *Strachan* v. *Hunter*, 1916 S.C. 901.

[5] *Gilchrist* v. *Westren*, 1890, 17 R. 363 ; *Hood* v. *North British Rly. Co.* (O.H.), 1895, 3 S.L.T. 196.

[6] Rankine on Leases, p. 288.

[7] *Sinclair* v. *Tod*, 1907 S.C. 1038.

(ii) *Length of Notice in Urban Subjects.*

205. The length of the notice for terminating a lease of urban subjects is regulated by statute. There are three enactments of importance: the Sheriff Courts (Scotland) Act, 1907,[1] the Removal Terms (Scotland) Act, 1886,[2] and the House Letting and Rating (Scotland) Act, 1911,[3] as amended by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.[4] The first-named provides:[5] "In all cases where houses, with or without land attached, not exceeding two acres in extent, lands not exceeding two acres in extent let without houses, mills, fishings, shootings, and all other heritable subjects (excepting land exceeding two acres in extent) are let for a year or more, notice of termination of tenancy shall be given in writing to the tenant by or on behalf of the proprietor, or to the proprietor by or on behalf of the tenant . . . provided further that the notice provided for by this section shall be given at least forty days before the 15th day of May when the termination of the tenancy is the term of Whitsunday, and at least forty days before the 11th day of November when the termination of the tenancy is the term of Martinmas." Leases of houses or other heritable subjects for less than a year may be terminated, when the period is four months or less, by notice given as many days before the ish as shall be equivalent to at least one-third of the full period of the let; and where the let exceeds four months, by notice given at least forty days before the expiry of the let, always, however, in the absence of express stipulation to the contrary.[6]

206. The Removal Terms (Scotland) Act, 1886, provides that, where under any lease entered into after the passing of the Act, the term of a tenant's entry to or removal from a house shall be one or other of the terms of Whitsunday or Martinmas, the tenant shall, in the absence of express stipulation to the contrary, enter to or remove from the house (any custom or usage to the contrary notwithstanding) at noon on the 28th day of May or the 28th day of November, as the case may be, or on the following day at the same hour where the said terms fall on a Sunday.[7] There follows a provision in substantially the same terms as in the 1907 Act with reference to the length of the notice required for the termination of leases at either Whitsunday or Martinmas.

(iii) *Small Dwelling-houses.*

207. A small dwelling-house under the House Letting and Rating Act, 1911, means a dwelling-house in a burgh or special district, where the Act is in operation, entered in the Valuation Roll at a certain yearly rent or value dependent on the population in such burgh or special district, but there is not included within the scope of the Act any house occupied by the owner, or in which the owner resides, or any house used as an inn, or let along with land, or in conjunction with a shop, workshop, stable, or byre.[1] By a later enactment the maximum rent for each type of burgh, or special district, was raised by 25 per cent. of the 1911 maximum.[2] A "lawful date" is provided by the 1911 Act for the termination of lets of small dwelling-houses, viz. noon on the 28th day of a month, or if that happens to be a Sunday, then on the Monday following. This applies to a let of one month or more. Should the let be for less than a month, then any Monday is a "lawful date." [3]

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[1] 7 Edw. VII. c. 51.

[2] 49 & 50 Vict. c. 50.

[3] 1 & 2 Geo. V. c. 53.

[4] 10 & 11 Geo. V. c. 17, ss. 16 and 18 (1) (*a*).

[5] Sec. 37.

[6] Sheriff Courts Act, 1907, s. 38.

[7] 49 & 50 Vict. c. 50, s. 4.

208. Notice to terminate the let of a small dwelling-house may be given by either the owner or the occupier in accordance with the provisions of the Sheriff Courts (Scotland) Act, 1907, relating to tenancies generally. This notice must expire at noon on the day upon which the next payment of rent falls due, if that is a "lawful date," as defined. If it is not, then this notice is to expire only at noon on the "lawful date" next following the said day on which the next payment of rent falls due. If the house is let for a period of more than three months, the notice is to be given at least forty days before the said day or "lawful date," as the case may be; and if the house be let for a period of three months or less, the notice is given as many days before the said day, or lawful date, as the case may be, as shall be equivalent to at least one-third of said period; except in the case of a let for a shorter period than one month, in which case the notice is given at least five days before the said day or "lawful date," as the case may be.[4] These provisions are mandatory and must be kept in view in the preparation of missives of lease of all subjects to which the Act applies.

(iv) *Notice Procedure.*

209. Every lease for a year or more is terminable only by notice in writing.[5] The notice must be formally given by a messenger-at-arms, or sheriff officer, or by registered letter signed by the proprietor, or by his factor or law agent.[6] A notice may be invalid in respect of failure properly to describe the subjects affected by it.[7] But if two distinct subjects are let at separate rents by the same lease, a decree of removal may be obtained in respect of one of the subjects only.[8] A form for the giving of notice is provided by the Sheriff Courts Act, 1907.[9] Verbal notice is sufficient to terminate a lease which is for less than a year. In such a case it is enough if the landlord is able to prove receipt by the tenant of intimation of the intention of the former to terminate the lease. A lessee cannot challenge the title of the original lessor to give a notice to remove, or to sue an action of removing.[10] Nor has a successor of the original lessee a better right to challenge. A lessor who has by missives sold the subjects let with postponed entry retains his right to sue an action of removing till the arrival of the date of entry.[1] On the other hand, the title of a successor of the original lessor may be impugned. In general, the obligation of such a successor is to be infeft in the subjects,[2] although the title of the pursuer in an action of removing, defective for want of infeftment, may be cured by the recording of a title before the calling of the case, or even before decree is granted.[3] The rule applies in general to an heir of the lessor as well as to a singular successor, and *a fortiori* to an heir who has no more than a personal right by survivance of his ancestor.[4] *Pro indiviso* proprietors must conjoin in giving notice, and suing an action of removing, unless there is some specialty which takes the case out of the general rule, as where one of two proprietors has clearly the authority of the other to give notice.[5] Persons who have a trust title to heritage, or who are charged with the control of heritage, such as trustees or judicial factors, have power to remove tenants as an ordinary act of administration, but an attorney or commissioner can do so only if specially empowered to that effect by his commission.

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[1] 1 & 2 Geo. V. c. 53, s. 1.

[2] 10 & 11 Geo. V. c. 17, s. 16.

[3] 1 & 2 Geo. V. c. 53, s. 3.

[4] *Ibid.*, s. 4.

[5] 7 Edw. VII. c. 51, s. 37.

[6] *Ibid.*, Rule 113.

[7] *Scott* v. *Livingstone*, 1919 S.C. 1.

[8] *Falconer* v. *Chisholm's Trs.*, 1925 S.C. 742 (O.H.).

[9] Form J.

[10] Ersk. ii. 6, 51; *Dunlop & Co.* v. *Meiklem*, 1876, 4 R. 11; *York Buildings Co.* v. *Carnegie*, 1764, Mor. 4054.

SUBSECTION (3).—*The Increase of Rent, etc. (Restrictions) Acts.*

(i) *Provisions as to Removal and Rent.*

210. The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920,[6] and subsequent amending enactments apply to every house or part of a house let as a separate dwelling in Scotland, when either the annual amount of the "standard rent" or the rateable value does not exceed £90.[7] "Standard rent" means the rent of a house as let on 3rd August 1914, or, if the house was not then let, the rent at which it was let before that date, or in the case of a house not let till after 3rd August 1914, the rent at which it was first let.[8] Previous legislation on the subject was repealed by the Act of 1920. Business premises were included within the scope of the restrictive code by the Act of 1920, but the application to such premises was made to terminate in Scotland on 28th May 1921, and the application was not renewed. A house or part of a house is, however, not excluded from the scope of the code merely because part of the premises is used as a shop, or office, or for business, trade, or professional purposes.[9] If a house is let with land or other premises, such are to be treated as part of the house if their rateable value, let separately, would be less than one-fourth of the rateable value of the house.[1] The landlord of a dwelling-house within the meaning of the code may be not only the proprietor of the house, but also a tenant who has lawfully sublet. A house erected after or in course of erection on 2nd April 1919 is not included.

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[1] *Grandison* v. *Mackay* (O.H.), 1919, 1 S.L.T. 95.

[2] *Traill* v. *Traill*, 1873, 1 R. 61 ; *Scott* v. *Fisher*, 1832, 10 S. 284.

[3] Rankine on Leases, p. 515 ; *Walker* v. *Hendry*, 1925 S.C. 855.

[4] Rankine on Leases, p. 516.

[5] *Graham* v. *Stirling*, 1922 S.C. 90 ; *Walker* v. *Hendry*, *supra*.

[6] 10 & 11 Geo. V. c. 17. [7] *Ibid.*, s. 12 (2). [8] *Ibid.*, s. 12 (1) (*a*).

[9] *Ibid.*, s. 12 (2) (ii). But see *M'Clymont's Trs.* v. *Ross*, 1929, S.L.T. 424.

211. The Act of 1920 was by its terms continued in force in Scotland till 28th May 1923,[2] but its operation, subject to amendments chiefly with reference to a tenant's right to retain possession of the dwelling-house let, has been renewed from time to time. In framing and interpreting leases of dwelling-houses to which the code applies, it is essential to have regard chiefly to two points: (first) tenants cannot be ejected from such houses so long as they conform to the conditions of their tenancy, subject to certain exceptions statutorily defined; (second) owners of such dwelling-houses were and are permitted to raise the rents thereof only to a limited extent and under strictly defined conditions. The rules as to retention of possession by a tenant are now contained in the Act of 1923,[3] as amended by the Prevention of Eviction Act of 1924.[4] Those affecting rents, and the permitted increases thereof, are found in the 1920 Act, as amended by that of 1923. It seems clear that any attempt on the part of a lessor and lessee of premises so controlled to contract out of these statutory provisions is illegal. In a case under the Act of 1915,[5] the opinions of a Court of seven judges were in the main adverse to the permissibility of contracting out. This view now receives effect both in England and Scotland. The first real step towards restoration of liberty to contract to lessor and lessee is found in the Act of 1923.[6]

(ii) *Decontrol.*

212. If a landlord was in possession of a controlled dwelling-house at the passing of the Act of 1923, or later comes into possession of it, the principal Act ceases to apply to such a house. In other words, it is decontrolled. Yet it is declared that possession must be actual possession, and not merely a change of tenancy with the landlord's consent.[7] It has been decided that decontrol is not effected by a renunciation of a lease by a sitting tenant and the re-letting of the house by the landlord.[8] Moreover, there is provision protecting lawful sublets from decontrol. In the Act of 1923 there is a further provision facilitating decontrol. If a landlord of a controlled house lets it on lease, or enters into an agreement for letting it on lease, for a period of not less than two years terminating after 24th June 1926, the principal Act ceases to apply as from the commencement of the term of the lease. This provision seems to permit the parties to such a lease to fix the rent at such sum as they may choose. With each renewal of the restrictive legislation, the date fixed for the expiry of such a lease, or agreement for a lease, has been postponed to a date subsequent to the expiry of the legislation itself.[1] The restrictive code applies to furnished houses in the sense that the lessor may not recover a rent therefor which exceeds a "normal" profit as defined in the code by 25 per cent. A lessor of a furnished house is otherwise in full possession of his ordinary rights.[2]

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[1] 10 & 11 Geo. V. c. 17, s. 12 (2) (iii).

[2] *Ibid.*, ss. 19 (2) and 18 (1).

[3] 13 & 14 Geo. V. c. 32.

[4] 14 & 15 Geo. V. c. 18.

[5] *Smith* v. *Barclay*, 1920, 1 S.L.T. 13.

[6] 13 & 14 Geo. V. c. 32, s. 2.

[7] *Ibid.*, s. 2 (3).

[8] *Caledonian Heritable Estates, Ltd.* v. *Methven*, 1927 S.C. 39.

SUBSECTION (4).—*Tacit Relocation.*

213. In every case where notice to terminate a lease has not been given by the lessor to the lessee, or *vice versa*, for the appropriate period and in correct form, at any rate where the lease is for a year or longer, the parties are held to have renewed the lease for a further period of one year by tacit relocation, and so from year to year, until due notice has been given.[3] Whenever tacit relocation operates, that is to say, immediately after the last date on which notice to terminate may competently be given, a new contract of lease is implied. Accordingly, even if the tenant quits the subjects at the end of the lease in a case where tacit relocation has operated, he remains liable in the same way as if he had remained in possession.[4] If separate subjects are let together at a *cumulo* rent the notice to terminate must be such as will cover all the subjects, otherwise the notice will be ineffective as regards all.[5] All the conditions of the original lease remain in force, unless inconsistent with something implied by the renewal.

214. Two questions have arisen: first, with regard to the length of notice required in a case where a lease for a year or more does not terminate at a term of either Whitsunday or Martinmas; and second, as to the application of the doctrine of tacit relocation to leases for shorter periods than one year. With regard to the former, it seems that the ordinary rules as to the period of notice apply to such cases;[6] and as to the latter, that the lease is renewed on the same terms and for the same period as the original lease, until notice is duly given. On the other hand, either a lessor or lessee might bar himself from denying that tacit relocation had operated by accepting rent in respect of a period subsequent to the termination of the lease.[7] There is a provision in the restrictive code to the effect that a landlord may accept rent for a period of three months after the expiry of a notice to quit, without prejudicing his claim to possession.[8] Tacit relocation is pleadable by the representative of a lessor or lessee who was entitled to found on it. It does not operate in the case of seasonal lets of any kind. Questions may arise as to whether a tenant is possessing under tacit relocation, or under a lease as altered by the parties. The same principles apply to the proof of an alteration made in a lease, as to the constitution of the lease itself.[9]

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[1] 13 & 14 Geo. V. c. 32, s. 2 (2).

[2] 10 & 11 Geo. V. c. 17, s. 12 (2) (i).

[3] Bell's Prin., s. 1265.

[4] *Robertson & Co.* v. *Drysdale*, 1834, 12 S. 477.

[5] *Gates* v. *Blair*, 1923 S.C. 430.

[6] *Neilson* v. *Mossend Iron Co.*, 1886, 13 R. (H.L.) 50.

[7] *Campbell's Trs.* v. *O'Neill*, 1911 S.C. 188.

[8] 10 & 11 Geo. V. c. 17, s. 16 (3).

[9] *Buchanan & Harris* v. *Sheldon*, 1900, 2 F. 935.

SECTION 14.—TRANSMISSION OF LEASES.

SUBSECTION (1).—*Assignation or Sublease.*

215. Consideration has already been given to the right of a tenant to assign or sublet. When, however, a lease is assigned, the assignation transfers to the assignee the original tenant's right to the lease, and the lease itself, from a specified date to the termination of the lease, the assignee being entitled to possess on the same terms as the assignor, and under obligation to implement the terms of the lease to the lessor. On the other hand, a sublease is similar in form to the principal lease. The principal tenant lets the subjects, and the subtenant binds himself to pay the rent to the principal tenant, who absolutely warrants the sublease to the subtenant,[1] in contrast with the warrandice which is usually granted or implied in an assignation, viz. warrandice by the principal tenant from fact and deed only. In an assignation the assignee becomes the true debtor for the rent in place of the original tenant, who has no longer any right to possess. On the other hand when a sublease is granted, the principal tenant remains bound to the lessor. He is at the same time liable to the subtenant to implement the obligations in the sublease, and may be unable to enforce a condition of the principal lease against the sublessee if he fails to import it into the sublease.[2] No personal action is, as a rule, competent to the landlord against a subtenant, there being no privity of contract between them. In cases where there is still a hypothec for rent the landlord may sequestrate the goods of the subtenant for rent due by the original lessee, without regard to the question whether the subtenant is due rent to the lessor or not.

SUBSECTION (2).—*Assignation in Security.*

216. Attempts have been made to constitute a security over leases by an assignation of a lease in favour of a creditor of the lessee. As the only method known to our law for the valid completion of such an assignation is by intimation thereof to the landlord, it seems impossible to devise any plan whereby such assignation may be made good against either singular successors of the landlord, or the general body of the lessee's creditors, apart from possession given to the assignee.[3]

SUBSECTION (3).—*Acquiescence in Sublease.*

217. If the lessor has assented to a sublease, either expressly or by implication, sequestration proceedings at his instance will be competent only when the subtenant's rent is in arrear. What amounts to acquiescence by the landlord in a sublease is always a question of circumstances. A receipt by the landlord in favour of the subtenant for one term's rent is not sufficient, nor even a series of receipts: there must be some act or acts on the part of the landlord, or his factor, clearly inferring an acceptance by the landlord of the subtenant as such.[1] If a sublease is granted with the consent or acquiescence of the landlord the sole measure of the subtenant's rights in a question with the landlord becomes the principal lease itself, as the landlord cannot give the subtenant any rights higher than he himself possesses, though he may give less. A subtenant, unless expressly or impliedly accepted by the landlord, cannot in a direct action against the landlord found on the warrandice expressed or implied by the principal lease. On eviction he must sue the principal tenant, who in his turn must sue the landlord.

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[1] *Downie* v. *R. B. Laird & Sons* (O.H.), 1902, 10 S.L.T. 28.

[2] *Fergusson* v. *Brown* (O.H.), 1902, 9 S.L.T. 341.

[3] Rankine on Leases, p. 184.

SUBSECTION (4).—*Transmission on Death of Tenant.*

218. On the death of the tenant intestate a lease passes to his heir-at-law, whose right vests without service or procedure of any kind.[2] In the case of heirs-portioners, the eldest heir-portioner succeeds, but subject to her giving compensation to the other heirs-portioners.[3] If the lease contains an exclusion of assignees and subtenants, while the lease will pass to the heir, the tenant cannot by settlement assign the lease to his trustees or to any other person. This is said subject to the provision of the Agricultural Holdings Acts anent the bequest of a lease.[4] A lease by its terms may exclude the succession even of the tenant's heir, as where the lease is expressed to be one for the tenant's liferent only.[5]

219. A lease being heritable *quoad* the succession of the tenant, questions may arise, on a consideration of the terms of a settlement, whether a lease is carried by the words used descriptive of the estate, but such questions can arise only where the lease is, either at common law or by its express terms, assignable. The question whether a tenant has or has not transferred a lease by his settlement is always one of intention. In cases where a tenant has by his will assigned a lease which he had no title, in terms of the lease, to do, the landlord may challenge the assignation. The tenant's heir has no title to challenge. A successful challenge by the landlord does not have the effect of cancelling the lease, but only of letting in the succession of the heir. Moreover, if there should be a question as to the tenant's right to assign by settlement, and the landlord expressly repudiates the succession of the assignee, the heir-at-law may then intervene and challenge the assignation.[6] Parole proof of an alleged assignation of a lease will not be allowed even to one in possession.[7]

SUBSECTION (5).—*Adoption of Lease.*

220. An heir is not bound to take up the succession to a lease any more than he is bound to take up the succession to a feu. It has not yet been decided that the executor of a tenant is liable for the loss sustained by a landlord through non-implement of a contract of lease, the question being specially reserved in one case by a Court of seven judges.[1] There is no longer any specified time for deliberation, but an heir is still entitled to six months before any action of constitution may be brought against him.[2] He may thus possess the subjects of lease, and even in the case of a farm cultivate the land without being held to have taken up the lease but, *ob majorem cautelam*, he should communicate to the landlord the footing on which he has taken possession, because his actings if equivocal may be founded on as evincing an intention either of taking up the lease on the one hand, or of abandoning it on the other.[3] When the heir does not take up the lease the personal representatives of the tenant may on his death be under certain liability to the lessor. For example, if the rent is in arrear, or if any obligations incumbent on the tenant under the lease have become prestable before the death of the tenant, his personal representatives are liable to implement these on an analogy between a lease and a feu-writ, which has been recognised in this connection.

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[1] *Fraser* v. *Fraser*, 1833, 11 S. 565.

[2] Ersk. iii. 8, 77.

[3] Bell's Prin., ss. 1219 and 1659.

[4] See para. 225, *infra*.

[5] Rankine on Leases, p. 160.

[6] *Murdoch* v. *Murdoch's Trs.*, 1863, 1 M. 330.

[7] *Barbour's Trs.* v. *Halliday*, 1883, 20 S.L.R. 673.

SECTION 15.—RENUNCIATION OF LEASES.

221. A minute or deed of renunciation is the writ granted by a tenant in favour of the landlord when the lease is terminated, that is to say, surrendered earlier than its natural expiry by consent of parties. The acceptance of a renunciation by a landlord, if made without reservation, has the effect of discharging the landlord's and tenant's claims *inter se*.[4] It has nevertheless been held that a tenant of agricultural subjects does not by renouncing lose his right to claim compensation for unexhausted improvements.[5]

SECTION 16.—TERCE.

222. In respect that a leasehold right is not feudal, the wife of a tenant has not and never had any right to terce in respect of leasehold subjects, and the same is true with reference to the courtesy of a surviving husband. The observation applies also to leases registrable under the Registration of Leases Act, 1857.[6]

SECTION 17.—AGRICULTURAL LEASES: SPECIALTIES.

SUBSECTION (1).—*General Effect of Legislation.*

223. The Ground Game Act, 1880,[7] the Hypothec Abolition Act, 1880,[8] and the Agricultural Holdings Act, 1883,[9] were the first modern legislative interferences with the freedom of landlord and tenant to express in leases such conditions of letting as they might choose for themselves. All leases of agricultural subjects must now be framed and construed with strict regard to the first of these statutes, which is still in force, as slightly amended by the Act of 1906,[1] to the second-named statute still in force, and to later legislation, particularly the Small Landholders Act, 1911,[2] and to the Agricultural Holdings (Scotland) Act, 1923,[3] superseding the Agricultural Act, 1920, and the Agricultural Holdings Act, 1908, itself a consolidating statute.

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[1] *Bethune* v. *Morgan*, 1874, 2 R. 186.

[2] Bell's Prin., s. 1638.

[3] *Moncreiffe* v. *Ferguson*, 1896, 24 R. 47; *M'Gavin* v. *Sturrock's Tr.*, 1891, 18 R. 576 (adoption of lease by trustee).

[4] *Robb* v. *Brearton*, 1895, 22 R. 885; *Walker's Trs.* v. *Manson*, 1886, 13 R. 1198; but see *Bidoulac* v. *Sinclair's Tr.*, 1889, 17 R. 144.

[5] *Strang* v. *Stuart*, 1887, 14 R. 637.

[6] *Munro* v. *Munro*, 1825, 4 S. 328; 20 & 21 Vict. c. 26.

[7] 43 & 44 Vict. c. 47.

[8] 43 Vict. c. 12.

[9] 46 & 47 Vict. c. 62.

SUBSECTION (2).—*Appropriate Special Clauses.*

224. An agricultural lease, now as formerly, provides for the letting of a farm to a tenant named, describes the subjects let, specifies the rent payable and the endurance of the lease, and it may be the conditions on which parts of the farm may be resumed by the proprietor. Even with regard to these essential conditions there are enactments which, rather than the lease itself, determine the ultimate rights of the parties to the lease. As to other clauses formerly regarded as essential in every agricultural lease, *e.g.* those regulative of cropping, compensation for improvements, rights in fixtures, the making of a contract between lessor and lessee has been largely taken out of the hands of the parties to be regulated legislatively as matter of public policy.

SUBSECTION (3).—*Bequest of Lease.*

225. Special destinations in agricultural leases, not to be confused with leases for prescribed periods plus the lifetime of named individuals, were formerly frequent and received effect. But the Agricultural Holdings Act, 1883, for the first time gave to a tenant of land the right to bequeath his lease on certain statutory conditions. This right, substantially repeated in each of the subsequent Agricultural Holdings Acts, is now regulated by the Agricultural Holdings Act, 1923.[3] This provision is effective for both agricultural and pastoral holdings, or for holdings partly the one and partly the other, and also for holdings which are wholly or partly cultivated as market-gardens. If a holding is let to a person during his continuance in any office or appointment, or in the employment of the landlord, the provision does not apply. The bequest need not necessarily be to a single nominee: it may be to several nominees, or even to a body of trustees.[4] This, however, is a provision out of which the parties to a lease may contract themselves.[5]

SUBSECTION (4).—*Small Landholders Acts.*

(i) *Landholders and Statutory Small Tenants.*

226. The Act of 1923 applies to all agricultural holdings. The Small Landholders Act, 1911,[6] is applicable only to the existing crofter, the existing yearly tenant, and the qualified leaseholder, *i.e.* every tenant of a small holding anywhere in Scotland who could satisfy a statutory tribunal—the Land Court—that he, or his predecessors in the same family, had provided or paid for the whole or the greater part of the buildings or other permanent improvements on the holding without recovering from the landlord or any of his predecessors in title payment, or any fair consideration therefor.[1] Every one in this category is a "landholder." As well as to the landholder the Act applies to the "statutory small tenant" who may be defined as: every tenant of a holding, the rent of which does not exceed £50 in money, or which does not exceed 50 acres in extent, who resides on, or not more than two miles from his holding, and cultivates it by himself or members of his family with or without hired assistance, and his heirs, legatees or assignees, if assignation be permitted by the lease.[2] Such a tenant was at the passing of the 1911 Act either actually or potentially a "statutory small tenant," for he may apply to the Land Court at the expiry of any current lease for a declaration that he is one.

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[1] 6 Edw. VII. c. 21.
[2] 1 & 2 Geo. V. c. 49.
[3] 13 & 14 Geo. V. c. 10.
[4] Rankine on Leases, p. 165.
[5] *Ibid.*, p. 166.
[6] 1 & 2 Geo. V. c. 49.

227. A landlord and a "statutory small tenant" may, of course, make bargains with each other, including a bargain as to the amount of the rent and the endurance of the lease, and embody these in formal leases;[3] but the Land Court may fix a "fair rent"[4] for the landholder, and an "equitable rent" for the "statutory small tenant," and in the case of the latter may renew the lease for such period as the Court may fix.[5] The "fair rent" cannot be altered, except by agreement, for seven years after the term of Whitsunday or Martinmas immediately following the decision of the Court. The result of the statute is that during the lifetime of the landholder, or the "statutory small tenant,"[6] neither is bound to remove from the holding, when required by the landlord to do so, but may remain in the holding unless the landlord can submit a statutory ground for his ejection. The statutory small tenant is bound to retain his holding for the period fixed by the Land Court. If once landlord and tenant have agreed on the conditions of a lease, these, except with regard to the amount of the rent and the period of the lease, cannot be altered except by consent of parties.[5] Attention is directed to the conditions under which a statutory small tenant may become a landholder,[7] to the right of a landlord to refuse to renew a lease if he can satisfy the Land Court that he has reasonable ground of objection to the tenant,[6] and to his right to set forth in a lease conditions, in addition to failure to pay rent, in respect of which a tenant may be removed, and to fence such conditions with an irritancy.

(ii) *Transmission by Landholder.*

228. The right conferred upon a landholder is declared to be equivalent to a lease, but the terms on which the land is held by him are really inconsistent with a contract of lease. The term "landholder" is so interpreted[1] that if there is no bequest by him, the right to the permanent tenancy of the holding descends to his heir-at-law, or in the case of heirs-portioners, to the eldest heir-portioner. The landholder's right to bequeath is more limited than that of an ordinary agricultural tenant, for the bequest must be to a member of his family only, that is, to his wife, or any person who, failing heirs, would succeed to him in case of intestacy, but always under certain statutory conditions.[2] The proprietor may object in the Land Court to a legatee in the same way as the proprietor may do in an ordinary lease before the Sheriff. The Land Court's decision on this point is final, and, if adverse to the legatee, the bequest becomes void.[3] Another power is conferred on the landholder by the 1911 Act. He may assign his holding to any member of his family to whom he might bequeath it, if he is unable to work his holding through illness, old age, or infirmity, but he must obtain the consent of the Land Court.[4]

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[1] 1 & 2 Geo. V. c. 49, s. 2 (iii) (*a*) and 2 (2).

[2] *Ibid.*, ss. 2 (ii) (*b*), 26 and 32 (1).

[3] *Ibid.*, s. 32 (6).

[4] 49 & 50 Vict. c. 29, s. 6 (1).

[5] 1 & 2 Geo. V. c. 49, s. 32 (7).

[6] *Ibid.*, s. 32 (4).

[7] *Ibid.*, s. 32 (11).

(iii) *Transmission by Statutory Small Tenant.*

229. It is implied in the definition of statutory small tenant that he also may bequeath his lease, but only to a member of his family, as explained above in the case of a landholder. A strict interpretation is judicially given to the Act with the result that illegitimates and relatives by marriage only are excluded.[5] The statutory small tenant has not the right, as in the case of the landholder, to make over his holding to a member of his family in the event of his being unable by reason of infirmity to work it. For a commentary on the statutory provisions relating to compensation for improvements, removal, freedom of cropping, penal rent, fixtures, compensation for unreasonable disturbance, see AGRICULTURAL HOLDINGS ACTS.[6]

SECTION 18.—MARKET-GARDENS.

230. The provisions of the Act of 1923 have also an important bearing on the preparation of leases of market-gardens. As to what is a market-garden, it was held in a recent case that an experimental bulb-growing establishment is not a "market-garden" in the ordinary use of language.[7] Compensation is payable to tenants of market-gardens for the improvements specified in the Third Schedule to the Act of 1923 as if these improvements had been comprised in Part III. of the First Schedule.[8] The following are important statutory rules directly or indirectly affecting leases of market-gardens: An incoming tenant who purchases an improvement may exercise his right to compensation for it, although the landlord has not consented to the purchase.[9] The provisions of the Act anent fixtures, etc. extend to all fixtures, etc. affixed, erected, or acquired by the tenant since 31st December 1900 for the purposes of his business as a market-gardener.[1] A tenant may remove all fruit-trees and fruit-bushes planted by him if not permanently set out; but, if the tenant does not remove them before the termination of the tenancy, these are to remain the property of the landlord without the tenant being entitled to compensation.[2] These rules apply whatever may be the terms of the lease.[3] Other rules of the Act of 1923 affect both agricultural and market-garden leases. See AGRICULTURAL HOLDINGS ACTS.[4]

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[1] 1 & 2 Geo. V. c. 49, s. 2 (2).

[2] 49 & 50 Vict. c. 29, s. 16; 1 & 2 Geo. V. c. 49, s. 21.

[3] Same statutes, ss. 16 (*d*) and 20.

[4] 1 and 2 Geo. V. c. 49, s. 21.

[5] Rankine on Leases, p. 655.

[6] Vol. I. p. 241, *ante*.

[7] *Watters* v. *Hunter*, 1927 S.C. 310.

[8] 13 & 14 Geo. V. c. 10.

[9] *Ibid.*, s. 42 (1) (*b*).

SECTION 19.—MINERAL LEASES.

231. The document by which minerals are let is called a lease, but its purposes are essentially different in character from those of a lease of the surface of the ground, or of buildings on the surface. The substances which are nominally let by a mineral lease, are in reality sold to the mineral tenant, who, instead of paying to the landlord rent, strictly so called, pays to him an agreed on part or share of the substance mined, described as a lordship or royalty. To such royalties a landlord's hypothec applies just as if these were rents in the strictest sense.[5] It frequently happens, however, that the surface of the ground adjacent to the mineral workings is let to the tenant for purposes subsidiary to the mining operations, in which case there is generally provision in the lease for a rent properly so called, as well as a lordship or royalty. In leases of minerals there is often expressed a power to work and win these, but this is not necessary, because a let of the minerals implies a power to work and win. It is usual, and indeed important, that the lease should specify the mode by which working is to be carried out, as, for example, that there is to be complete excavation by the method known as stoop and room. Even a mineral lease is invariably for a definite period, yet it is common to make provision for breaks in the lease at definite intervals—this because the minerals may fail, or become so difficult to work that profitable operations are impossible. If breaks are inserted in the lease, with these possibilities in view, the tenant is not allowed to abandon on the ground that the minerals let are not capable of profitable working.[6] It occasionally happens that a fixed rent in addition to or instead of a lordship or royalty is stipulated for in the lease, but when this is so a certain brief trial period may be agreed on before the fixed rent begins to run. Lordships and royalties are adjusted in accordance with the value and quality of the mineral, and in the case of coal, even with reference to the size of the coal. Different mineral substances may be let to one tenant under one lease, and in that case a different royalty is provided on each ton of each substance, coal, ironstone, shale, and the like. A provision is common to the effect that all coal, capable of passing through a screen with mesh of a certain size is to be treated as dross, and a smaller royalty paid thereon. There may also be provision for what is known as a "sliding scale" royalty, that is a scale dependent on the rise or fall of the price of the mineral in question, say on the Glasgow market. A mineral lease may also include what is known as a "shorts clause," as when the landlord is entitled, where royalties fall below a certain sum per annum, to require payment of a rent fixed by the lease: the tenant is then entitled to work out, within a certain period, a quantity of the mineral free of royalty to compensate for what he has thus had to pay to the landlord in the form of rent. It is also usual to provide for the tenant working a specified amount of "royalty free mineral" to be used for the tenant's purposes, such as for pit engines, miners' houses, and the like.

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[1] 13 & 14 Geo. V. c. 10, s. 42 (1) (ii).
[2] *Ibid.*, s. 42 (1) (iii).
[3] *Ibid.*, s. 45.
[4] Vol. I. p. 241, *ante*.
[5] *Liqrs. of Linlithgow Oil Co.* v. *Earl of Rosebery*, 1903, 6 F. 90.
[6] *Gowans* v. *Christie*, 1873, 11 M. (H.L.) 1.

232. A provision binding the mineral tenant to afford adjacent or subjacent support for buildings within a certain distance of the intended workings is common in mineral leases. In this connection, be it observed, a feu may be granted in such terms as to confer no right on the feuar to support either adjacent or subjacent as against the owner or lessee of the minerals.[1] If, however, the surface owner is entitled to support, his compensation is measured, apart from express bargain, as at the date of the breach of the obligation, not at the date of the mineral lease.[2] This was said, however, with regard to erections on ground of a normal character, not with reference to ground which had been, since the date of the feu, covered by streets. A railway company acquiring land compulsorily under the Lands Clauses Act is not entitled to require from a lessee of an adjoining mineral field either adjacent or subjacent support.[3] The reverse is true if the railway company acquires land by purchase non-compulsorily.[4] Yet the Railway Clauses Act provides that minerals under a railway, or within 40 yards of it, shall not be worked unless after due notice given to the railway company, so that the company may have an opportunity of acquiring the minerals, if necessary, for the support of the line.

233. Other usual conditions in mineral leases are: (1) an obligation on the tenant to provide means for determining the amount of the royalties payable to the lessor, *e.g.* steelyards for weighing the coal, books in which the tenant is bound, for the information of the landlord, to enter the quantities of minerals dispatched by road or rail, plans of the underground workings, to facilitate surveys by the landlord's engineer, with a view to his being satisfied that operations are being conducted in such a way as to yield a true record of the output; and (2) a stipulation that the tenant will restore the surface of the land let to him at the conclusion of the lease, or pay a sum, to be fixed by arbitration, by way of compensation to the landlord. With regard to an agreement for a lease of minerals which would contain all clauses "usual and necessary," it was held that the tenant was entitled to the insertion of a clause empowering him to remove his buildings and machinery at the end of the lease, unless the landlord agreed to take these at valuation.[1] In mineral leases the landlord frequently retains power to rescind if dissatisfied with the working by the tenant. The landlord resuming in pursuance of such a clause is not bound to state the grounds of his dissatisfaction.[2]

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[1] *Buchanan* v. *Andrew*, 1873, 11 M. (H.L.) 13.

[2] *Neill's Trs.* v. *Wm. Dixon, Ltd.*, 1880, 7 R. 741.

[3] *Caledonian Rly. Co.* v. *Henderson*, 1876, 4 R. 140.

[4] *Caledonian Rly. Co.* v. *Lord Belhaven*, 1857, 3 Macq. 56.

SECTION 20.—BUILDING OR LONG LEASES.

SUBSECTION (1).—*Registration.*

(i) *Object of Registration Act.*

234. As has been pointed out, an ordinary lease, whether of agricultural or other subjects, cannot be used as a security for debt, for the reason that the only method by which a creditor can validate such a security is by taking possession of the security subjects, under an assignation of the lease. An attempt was made to give a security to a creditor by granting a sublease in his favour, the granter remaining in possession of the subjects let; the granter became bankrupt, and it was held, in a competition between his trustee and the subtenant, that the trustee must prevail.[3] One of the main purposes of the Act of 1857[4] was to alter the law by permitting the registration of certain leases in the Particular, General, or Burgh Registers of Sasines, and to render such leases valid when so registered without possession. The Act expressly declares the continued validity, against singular successors, of all leases granted before its passing and rendered registrable by its terms, although not registered.[5] A lessee under a building lease is the proprietor, within the meaning of the Lands Valuation Act, 1854, and the Burgh Police Acts, and is, as such, liable for the owners' proportion of local rates.[6]

(ii) *Conditions precedent to Registration.*

235. While a lease may be registered, whether dated before or after 10th August 1857, it must, if it is to be registered, (1) be probative; (2) be of a duration not less than thirty-one years,[7] or contain a clause binding the lessor to renew, so that the lease will extend for over that period;[8] (3) contain a statement of the name of the lands of which the subjects let consist, or form part; (4) expressly set forth the extent of the land let, which must not exceed 50 acres, unless the lands let were held burgage prior to the Conveyancing Act, 1874, or the subjects let are mines or minerals.[1] There are two exceptions to rule (3), viz. (*a*) cases where the subjects let were held burgage before the passing of the 1874 Act; and (*b*) if the lease is dated before 10th August 1857 and contains an obligation for renewal.

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[1] *Wilson* v. *Douglas*, 1868, 7 M. 112.

[2] *Houldsworth* v. *Brand's Trs.*, 1875, 2 R. 683.

[3] *Brock* v. *Cabbell*, 1831, 5 W. & S. 476.

[4] 20 & 21 Vict. c. 26.

[5] *Ibid.*, s. 3.

[6] *MacBain* v. *Gordon*, 1917 S.C. 185.

[7] 20 & 21 Vict. c. 26, s. 17.

[8] *Ibid.*, s. 1.

(iii) *Registrable Writs.*

236. The writs which may be registered under the Act are leases complying with the rules just stated and the following: assignations of such leases whether absolute or in security; [2] translations, *i.e.* transfers of assignations; [3] writs of acknowledgment, *i.e.* writs granted by the lessor or his successor in favour of an heir of the lessee, and completing the title of the latter; [4] adjudications; [5] notarial instruments, including notices of title; [6] discharges and renunciations; [7] and extract decrees of reduction relating to such recorded leases and these cognate writs.[8] If a lease or one of these relative writs has been registered for preservation an extract may be used in recording for publication. This applies not only to the Books of Council and Session and Sheriff Court Books,[9] but also to the Commissary Records prior to 1809.[10]

(iv) *Competent Registers.*

237. By the 1857 Act leases to which it applies may be recorded in the General Register of Sasines, or in the Particular Register of Sasines—till discontinuance—for the district in which the lands and heritages are situated [11] if the subjects let are held feu. When the lands were held burgage either at the date of the passing of the 1857 Act, or were held burgage prior to the passing of the 1874 Act, leases are registrable in the appropriate Burgh Register.[11]

(v) *Effect of Registration.*

238. The effect of registration is summarised by the Act thus: All registrable leases, valid in a question with the granters thereof, and registered subsequent to the date of entry mentioned therein, are effectual against any singular successor in the subjects whose infeftment is later than the date of registration. A preference is established in virtue of such registration as effectually as if the lessee, or party succeeding to him, had entered into actual possession of the subjects let at the date of the registration of the lease.[12] This statement applies not only to leases, but to assignations absolute or in security, translations, writs of acknowledgment, adjudications of leases, notarial instruments, and now notices of title. The date of registration determines the preference among writs recorded under the Act.[13] If neither of two assignees of the same subjects, each holding a registrable assignation, has entered into possession, the one first registering is preferred to the one who has merely intimated his assignation to the lessor.[1] The effect of registration is no higher than possession.[2] In certain circumstances, however, possession retains its importance in relation to registrable leases. A lessee or assignee in possession in respect of a lease complying with the Act 1449, although it has not been registered, will hold the subjects let against a lessee or assignee of the same subjects holding under a writ registered later in date than the date of possession.[2] It thus appears that holders of registered leases are not under the Act of 1857 in so secure a position as the holder of a duly recorded conveyance of land, who, while *in bona fide*, may deal on the faith of the records.

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[1] 20 & 21 Vict. c. 26, s. 18.

[2] *Ibid.*, ss. 3 and 4.

[3] *Ibid.*, s. 6.

[4] *Ibid.*, s. 7.

[5] *Ibid.*, s. 10.

[6] *Ibid.*, s. 8; 1924 Act, s. 24.

[7] *Ibid.*, s. 13.

[8] *Ibid.*, s. 14.

[9] *Ibid.*, s. 19.

[10] 40 & 41 Vict. c. 36.

[11] 20 & 21 Vict. c. 26, s. 1.

[12] *Ibid.*, s. 2.

[13] *Ibid.*, s. 12.

239. Certain leases may be registered, and so made valid against singular successors, which would not be valid against singular successors under the 1449 Act, as, for example, leases in perpetuity, leases on which there has been no possession, and leases granted for merely nominal rents.

Subsection (2).—*Forms of Assignations.*

240. The Act of 1857 provides a form of a bond and assignation in security which contains a power of sale and is substantially similar to an ordinary bond and disposition in security. After the passing of the 1857 Act, and till the passing of the Heritable Securities Act, 1894, sales under bonds, and assignations in security, were carried through in conformity with the powers conferred by the Heritable Securities Act, 1847. But by the Act of 1894 it was provided [3] that such sales could be carried out under the provisions in the Titles Act of 1868. The effect of the Conveyancing Act, 1924, will later be noticed.[4] A recorded assignation may be wholly or partially transferred by a translation in the form of Schedule D to the Act. Registration of this writ effectively completes an assignee's title.

241. A renunciation of a recorded lease may be granted in the form of Schedule G to the Act, and may be endorsed on the lease itself. A discharge of a recorded assignation in security may be granted in the form of Schedule H and also endorsed on the lease. When these writs are recorded in the appropriate Register of Sasines the renunciation is complete, and the record is cleared of the security assignation.[5]

242. Elaborate provision is made in the Act of 1857 for the completion of the title of persons acquiring right to recorded leases or recorded assignations thereof, whether absolute or in security. The heir of such a lessor or assignee may expede a general service, and in the former case obtain a writ of acknowledgment from the lessor, and in the latter from the granter of the assignation in security. The lessor granting the writ of acknowledgment must be infeft in the subjects in security. A defect in the title of the granter of a writ of acknowledgment does not affect the title of his heir.[1] Alternatively an heir, a general disponee, or a trustee in the bankruptcy of one who had right to a recorded lease or a recorded assignation in security, may complete title by notarial instrument in the form of Schedule F.[2] If the holder of an assignation or translation has died before recording his title his heir-general may also complete a a title by notarial instrument, in the form of Schedule F, but the heir must expede a general service.[3] The right of an adjudger to complete a title to a recorded lease adjudged is also set forth in the Act.[4]

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[1] *Rodger* v. *Crawford*, 1867, 6 M. 24.

[2] 20 & 21 Vict. c. 26, s. 16; Rankine on Leases, p. 189.

[3] 57 & 58 Vict. c. 44, s. 14.

[4] See para. 243, *infra*.

[5] 20 & 21 Vict. c. 26, s. 13.

SUBSECTION (3).—*The Conveyancing Act,* 1924.

243. This Act [5] contains provisions with reference to the forms which may be used for writs relating to recorded leases.[6] These provisions are permissive, not mandatory. Further, it seems that the provisions are not retrospective. Briefly stated, the position under the Act of 1924 is that it authorises the forms appropriate to dispositions of land, and the creation or transfer of rights in security over land, to be adapted for use in relation to the transfer of recorded leases and the creation and transfer of rights of security over leases. But it should be observed, that it is only those powers conferred on, or implied in favour of a person in right of land, or a security over land by the Act of 1924 which are to be held as conferred upon, or implied in favour of a person in right of a lease, or a security over a lease. Accordingly, powers specially conferred on persons in right of land or a security over land by some earlier statute but not by the Act of 1924 would not be held as covered by s. 24 of the 1924 Act. In connection with this section the following points should, in addition to those mentioned, be observed: (1) In an assignation of a lease, or in a bond and assignation in security of a lease, or in a notice of title which by virtue of the section may be expede in place of notarial instrument, there may be substituted for a description of the land a reference to the lease in the terms of Schedule J to the Act; [6] (2) in a writ of acknowledgment in terms of the 1857 Act, it is no longer necessary to describe the land if a reference to the lease is inserted in the writ in the form of Schedule J; (3) a renunciation of a lease may now be competently granted by one who has not a completed title to the lease, provided he deduces his title from the person holding the last recorded title. Each of these as well as the other conveyancing provisions contained in s. 24 involves amendments of provisions of the Act of 1857.

SUBSECTION (4).—*Long Leases by Trustees.*

244. Testamentary and other trustees to whom the Trusts (Scotland) Acts, prior to that of 1921, applied had not power to grant long leases of the heritable estate under their control unless the writ constituting the trust conferred the power. They were entitled under the Trusts Act, 1867, to apply to the Court for authority to do so, which the Court granted if expedient for the trust and not inconsistent with its intention. But the Trusts (Scotland) Act, 1921, which is on this point retrospective, conferred on trustees, as defined by the Act, power to grant long leases of heritable subjects, provided these are not at variance with the terms and purposes of the trust. Even if at variance with the express terms of the trust, the Court may give authority to grant long leases if it is deemed expedient in the interest of the trust to do so.[1]

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[1] 20 & 21 Vict. c. 26, s. 7.
[2] *Ibid.*, ss. 8 and 11.
[3] *Ibid.*, s. 9.
[4] *Ibid.*, s. 10.
[5] 14 & 15 Geo. V. c. 27.
[6] *Ibid.*, s. 24.

SUBSECTION (5).—*Rights of Assignees in Security.*

245. A creditor in a bond and assignation in security of a recorded lease is not entitled to poind the ground because, as has been pointed out, his security is not over the land but over the lease, nor can he competently raise an action of maills and duties against subtenants in possession of the leasehold subjects. On the other hand, the creditor or other person in right of such an assignation in security is entitled on default of payment of the capital sum for which the security has been granted, or of a term's interest thereof, for six months after such capital sum or term's interest has fallen due, to apply to the Sheriff for a warrant to enter into possession of the heritages leased. On such application the Sheriff, after intimation to the lessee for the time being and to the landlord, shall if he sees cause grant the warrant. The warrant is declared to be a sufficient title for the party in right of the assignation in security to enter into possession of the subjects contained in the lease, and to uplift the rents from any subtenants, and to sublet the same as fully and to the like effect as the lessee might have done. Nor does the creditor or other party in right of the assignation in security, unless and until he enters into possession under the warrant, render himself personally liable to the landlord in any of the obligations or prestations of the lease.[2]

SUBSECTION (6).—*Long Leases of Entailed Lands.*

246. The only one of the entail prohibitions of general importance in this connection is that against alienation which, strictly construed and interpreted, strikes at long leases,[3] in contrast with leases of ordinary duration. The latter are not alienations in any strict sense, but are necessary for the advantageous reaping of the fruits of the subjects let.[4]

SECTION 21.—MISCELLANEOUS.

SUBSECTION (1).—*Bowing Contract.*

247. The contract known as bowing, or bowing of cows, is peculiar to certain parts of Scotland, chiefly Ayrshire, Lanarkshire, Renfrewshire,

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[1] 11 & 12 Geo. V. c. 58, s. 5. [2] 20 & 21 Vict. c. 26, s. 6. [3] Rankine on Leases, p. 55.

[4] *Ibid.*, p. 56, and cases there cited; see also ENTAIL, Vol. VI. p. 195, *ante*.

Kirkcudbright, and Caithness. It is explained and illustrated in Hunter on Landlord and Tenant.[1] By the contract the owner or tenant of a farm lets a stock of cows to one who is called the "bower." The bower grazes the cows on the farm, pays a certain sum, usually a specified amount for each cow, to the owner or tenant, and the bower remunerates himself by the sale of the dairy produce. The fields on the farm to be grazed by the cows may, in the contract, be particularised, or may be altered from time to time to accord with the rotation of cropping. A house and offices may be assigned to the bower, and the contract, not infrequently, provides for the produce being conveyed to market by the owner or tenant of the farm. The bower has, normally, exclusive possession of the grazing fields, but the owner or tenant of the farm continues to be the owner of the cows and takes the risks attending ownership. He also remains liable for the rates and assessments exigible in respect of the grazing fields. The question has been canvassed as to whether the contract is truly one of lease or sublease to the bower on the one hand, or merely a contract by which the bower acts as manager for the owner or tenant, on an unusual basis of remuneration, on the other hand. The question is not settled by a decision to which Mr. Hunter refers,[2] but it is not of great practical importance.

SUBSECTION (2).—*Steelbow.*

248. Steelbow is the name given to a contract which has been in disuse since the middle of the nineteenth century. Under it a lessor gave to a lessee at entry to a farm "corn, straw, cattle, or instruments of tillage, which got the name of steelbow goods," [3] on condition that goods to the same quantity, and of the same quality, would be delivered to the lessor by the lessee at the expiry of the lease. It seems to be a relic of days when tenants could readily be found to labour the ground, but without the means necessary for stocking and equipping the farm. Its interest to-day is archæological only, save that it is supposed to be the origin of the practice under which tenants at the termination of a lease are required to leave the dung and growing crops on the farm to the landlord or incoming tenant. The subject is fully discussed in Hunter on Landlord and Tenant,[4] and an explanatory statement is made by each of the institutional writers.[3]

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[1] 4th ed., i. 358.

[2] *Goldie* v. *Oswald & Kennedy*, 1839, 1 D. 426.

[3] Ersk. ii. 6, 12.

[4] 4th ed., i. 325.

LEASING-MAKING.

See CRIME.

LEGACIES.

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SECTION 1.—DEFINITION.

249. A legacy is a bequest made by a testator, to take effect at or after his death, in favour of the object of his bounty, who is called the legatee. Under the old law in Scotland a legacy was, properly speaking, a gift of a moveable subject, but the distinction between heritage and moveables in this connection is now of little importance, since by the operation of the Conveyancing Statutes heritage may be disposed of by testamentary deeds.

SECTION 2.—CLASSIFICATION.

250. Legacies may be classified as general legacies, special legacies, demonstrative legacies, and universal or residuary legacies.

SUBSECTION (1).—*General Legacy.*

251. A general legacy or *legatum quantitatis* is a legacy not of any particular subject but of a certain quantity or value to be provided from the testator's general estate. Such a legacy confers merely a personal right of action against the executor, who, if he has a sufficient sum of free estate in his hands for the purpose, must satisfy the legacy.[1] In the event of inadequacy of funds, general legacies abate *pari passu*, not according to priority of bequest.[2] A *legatum generis* is a legacy of a subject "bequeathed indefinitely, without any character distinguishing it from others of the same kind belonging to the deceased," as a horse, a piece of tapestry, etc. This confers no *jus in re*; but according to the Civil Law the estate is not to be compelled to give the best, nor the legatee to accept the worst.[3] When a legacy is otherwise general, the mere exception therefrom of something specifically described will not make the gift more specific, in the proper sense of the term, than it would be were there no such exception.[4] A right of selection, as *e.g.* a right to select such articles of furniture as he may choose, may be conferred upon a legatee.[5]

SUBSECTION (2).—*Special Legacy.*

252. A special (or specific) legacy is a bequest of a particular subject or debt or sum specially distinguished. In an English case a specific legacy was defined as "something which a testator, identifying it by a sufficient description, and manifesting an intention that it should be enjoyed in the state and condition indicated by that description, separates in favour of a particular legatee from the general mass of his personal estate."[6] The subject of the legacy may be a special article or sum of money (as *e.g.* a sum described as in the hands of a particular individual or invested in a specified investment[7]), or a debt due to the testator,[8] or a bond,[9] or the proceeds of a policy of insurance.[10] Where shares in a company are bequeathed, the mere fact that the testator had at the date of the will shares answering the description of the shares in the bequest will not make the legacy specific.[11] A bequest of a particular subject for the purpose of sale and division of the proceeds in definite shares has been held in England to be a gift of specific legacies.[12] Both in England and Scotland the inclination of the Courts is, if possible, to construe a legacy as general rather than as specific.[13]

253. A special legacy has the effect of an assignation *mortis causa*, and is completed by the testator's death; so that the special legatee has a direct action against the possessor of the fund or subject, or the debtor in the bond, the executor being made a party to the action in order that the rights of the creditors of the testator may be protected.[1] Special legacies are preferable to general and residuary legacies, and do not abate so long as the estate is sufficient to pay the testator's debts and the expenses of administration; but, on the other hand, they are liable to ademption.[2] If a heritable subject bequeathed to a legatee is burdened with debt, the legatee takes the subject *cum onere*, unless there is a clear indication that the testator intended that the debt should be met from his other estate, and a general direction to trustees or executors to pay the testator's debts will not suffice to relieve the legatee of the debt.[3] The same principle has been applied to encumbrances affecting items of moveable estate, so that the recipient of a special legacy takes the subject bequeathed with the burden attaching to it; [4] but, in view of Lord Dunedin's opinion in *Reid's Trs.* v. *Dawson*,[5] this point is not free from doubt. In England the rule is that, unless the testator shews that he meant the thing to be taken as it stands,[6] a specific legatee has the right to have his specific legacy freed from the debts and liabilities of the testator existing at his decease; [7] and if the testator has pledged the legacy, the legatee is entitled to compensation out of the general funds.[8]

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[1] Ersk. iii. 9, 11; M'Laren on Wills and Succession (3rd ed.), i. 575, 577.

[2] See para. 256, *infra*.

[3] Ersk. iii. 9, 13.

[4] *Robertson* v. *Broadbent*, 1883, 8 App. Cas. 812.

[5] *Macdonald's Trs.* v. *Bain's Trs.*, 1896, 23 R. 913; *Gray's Bairns* v. *Kennedie*, 1649, 1 Bro. Supp. 408.

[6] *Robertson* v. *Broadbent, supra*, per Lord Selborne.

[7] *Anderson* v. *Thomson*, 1877, 4 R. 1101; *Maclean* v. *Maclean's Ex.*, 1908 S.C. 838.

[8] *Cobban's Exrs.* v. *Cobban*, 1915 S.C. 82.

[9] *Pagan* v. *Pagan*, 1838, 16 S. 383.

[10] *Davidson's Trs.* v. *Davidson*, 1901, 4 F. 107.

[11] *Barr's Trs.* v. *Ardrossan Castle Curling Club*, 1901, 3 F. 903; *Dewar* v. *Kirk Session of Torryburn*, 1864, 2 M. 910.

[12] *In re Jeffery's Trusts*, 1866, L.R. 2 Eq. 68; *Walker* v. *Laxton*, 1827, 1 Y. & J. 557.

[13] *Douglas's Exrs.*, 1869, 7 M. 504, at p. 509; Jarman on Wills (6th ed.), ii. 1067.

SUBSECTION (3).—*Demonstrative Legacy.*

254. A demonstrative legacy is a legacy which is payable out of, or is secured upon, a particular fund or security. The question which usually arises, where the testator refers to the fund or subject to be devoted to payment of the legacy, is whether this reference is merely an indication of the portion of his estate which is to be primarily liable in payment of the legacy, in which case any deficiency in the fund or subject must be made good to the legatee from the testator's general estate; [9] or whether the reference is taxative and limits the legatee's claim to the existing amount of the fund or subject, so that if it should fail or prove inadequate he has no right of recourse against the general estate. A legacy of the first class is demonstrative. It partakes of the nature of a general legacy, in that it is not dependent on the existence of the fund or subject, and, therefore, if the fund be called in or paid, the legatee will not be deprived of his legacy, but will receive it out of the general estate; while, on the other hand, it resembles a special legacy in respect that it does not abate with the general legacies until after the fund out of which it is payable is exhausted.[1] Where the reference to the fund is taxative, the legacy is special. In cases of doubt the presumption is in favour of the reference being demonstrative and not taxative.[2] In *Duncan* v. *Duncan*,[3] Romilly M.R. observed that if a portion of a debt is given to one person and the remainder of the debt to another, the legacies are specific; but if the testator says: "I give a legacy of a particular sum to A., and desire it to be paid out of a particular debt," this is merely demonstrative.[4]

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[1] Stair, iii. 8, 23 and 38 ; Ersk, iii. 9, 11 ; *Forrester* v. *Clerk*, 1627, Mor. 2194 ; *Hinton* v. *Connell's Trs.*, 1883, 10 R. 1110, per Lord Pres. Inglis at p. 1115.

[2] See para. 283, *infra.*

[3] *Frazer* v. *Spalding*, 1812, 5 Pat. 642 ; *Douglas's Trs.* v. *Douglas*, 1868, 6 M. 223 ; *Mackintosh* v. *Mackintosh*, 1870, 8 M. 627 ; *M'Leod's Trs.*, 1871, 9 M. 903 ; *Wright's Trs.* v. *M'Laren*, 1891, 18 R. 841 ; *Brand* v. *Scott's Trs.*, 1892, 19 R. 768 ; *Welch's Trs.* v. *Edinburgh Life Assurance Co.*, 1896, 23 R. 772 ; *Adam's Trs.* v. *Wilson*, 1899, 1 F. 1042 ; Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94), ss. 12 and 47.

[4] *Stewart* v. *Stewart*, 1891, 19 R. 310 ; *Heath* v. *Grant's Trs.*, 1913 S.C. 78.

[5] 1915 S.C. (H.L.) 47.

[6] *Ledger* v. *Stanton*, 1862, 2 J. & H. 687 ; *Hawkins* v. *Hawkins*, 1880, 13 Ch. D. 470.

[7] Theobald on Wills (8th ed.), 182 ; *Bothamley* v. *Sherson*, 1875, L.R. 20 Eq. 304.

[8] Theobald on Wills, *ibid.* ; *Ashburner* v. *Macguire*, 1786, 2 B.C.C. 107, per Lord Thurlow.

[9] As in *Drummond* v. *Drummond*, 1624, Mor. 2261 ; *Finlaw* v. *Little*, 1676, Mor. 2264 ; *Wauchop* v. *Wilson*, 1724, Mor. 8063 ; *Melvin* v. *Nicol*, 1824, 3 S. 31 ; *Bell* v. *Brodie*, 1847, 9 D. 712 ; *Douglas's Exrs.*, 1869, 7 M. 504 ; *Chivas' Tr.* v. *M'Leod*, 1881, 9 R. 86 ; *Reid's Trs.* v. *Dawson*, 1915 S.C. (H.L.) 47 ; *M'Kenzie* v. *Barker's Trs.*, 1905, 13 S.L.T. 501.

SUBSECTION (4).—*Universal Legacy or Residue.*

255. A universal legacy or residue comprehends all the testator's estate, or what remains after satisfying expenses, debts, and other legacies.[5] "It comprises the whole *corpus* and income of the estate not exhausted by any antecedent direction."[6] It is a *unum quid,* though its amount may be affected by contingencies; that is to say, a conditional bequest which lapses is to be regarded as a mere burden upon the original gift of the residue, which flies off upon the lapse. The residuary legatee is not conditionally instituted to prior legatees, but is *ab origine* entitled to the whole estate not otherwise disposed of, whatever its amount may be.[7] The presumption is that the word "residue" occurring in a testamentary writing carries the residue of the testator's whole estate, but the word may be used to denote the balance not of the whole estate but of some particular fund or portion of the estate;[8] and there may be partial residues.[9] Where a residuary bequest is made in favour of a number of beneficiaries, and one of the shares is afterwards revoked or lapses, this share will fall into intestacy, unless accretion is expressly provided for, or may be implied from the terms of the bequest.[10] The debtor of the deceased does not become the debtor of the residuary legatee any more than of a general legatee, and a residuary legatee has consequently no title to sue him;[1] but the title of a beneficiary to sue was sustained in a case in which he averred that the trustees on the estate were acting in concert with the debtor to defeat her claim.[2]

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[1] *Tempest* v. *Tempest*, 1857, 7 D. M. & G. 470; *Creed* v. *Creed*, 1844, 11 Cl. & F. 491, at p. 509; *Vickers* v. *Pound*, 1858, 6 H.L. C. 885; *Mullins* v. *Smith*, 1860, 1 Drew. & Sm. 210; *Walford* v. *Walford*, [1912] A.C. 658, at p. 663.

[2] *Chalmers* v. *Chalmers*, 1851, 14 D. 57, at p. 60.

[3] 1859, 27 Beav. 390.

[4] See also *Williams* v. *Hughes*, 1857, 24 Beav. 474.

[5] Stair, iii. 8, 38; Ersk. iii. 9, 6.

[6] *Sturgis* v. *Meiklam's Trs.*, 1865, 3 M. (H.L.) 70, per Lord Westbury. When the legal rights of children or a spouse have to be met, a bequest of a share of the "free residue" of the estate means primarily a share of the residue as ascertained after deduction of the amount of the legal rights (*Samson* v. *Raynor*, 1928 S.C. 899).

[7] *Storie's Trs.* v. *Gray*, 1874, 1 R. 953; *Yule's Trs.* v. *Deans*, 1919 S.C. 570, per Lord Skerrington.

[8] *Millar* v. *Morrison*, 1894, 21 R. 921; *Gore Booth's Trs.* v. *Gore Booth*, 1898, 25 R. 803.

[9] *Brown* v. *M'Lae's Trs.*, 1877, 5 R. 37; *Stobie's Trs.*, 1888, 15 R. 340.

[10] See VESTING IN SUCCESSION, and para. 259, *infra*.

SECTION 3.—ABATEMENT OF LEGACIES.

256. "If the whole legacies exceed the dead's part of the free gear, regularly they are abated proportionally, wherein there is no preference nor privilege granted to legacies granted *ad pias causas.* But if the defunct express his will to leave a legacy without defalcation, it will not be defalked with the other legacies."[3] If abatement has to take place, then, unless the testator directs otherwise, the first to suffer is the residuary legatee, next the general legatees, and lastly the special legatees.[4] The debts of the estate primarily affect the residue, and any deficiency in the estate passing under a testamentary deed occasioned through a claim by a spouse or child for his or her legal rights will fall to be met in the first instance out of residue.[5] A legacy for mournings is preferable to other legacies, to the extent of the cost of suitable mournings.[6]

SECTION 4.—CONSTITUTION OF LEGACIES.

257. A verbal or nuncupative legacy is effectual to the extent of £100 Scots only;[7] and, if the legacy bequeathed verbally is of larger amount, it will be effectual to that extent.[8] A testament which is invalid will not be sustained as importing nuncupative legacies;[9] but if "left in proper words" a nuncupative legacy will receive effect, although the testator may subsequently have directed that it should be put in writing and this was not done.[10] Where a person who is named residuary legatee in a will acknowledges that he received from the testator directions to hold the estate in trust for, or to make payments out of it to, other parties, he is bound by these directions.[11] But in the case of a person who has no connection with the estate except as trustee or executor under a deed which destines the property to other parties, no verbal instructions can have the effect of defeating or controlling that destination, except to the extent to which they may be sustained as constituting a nuncupative legacy.[1] The granting of a bill or cheque payable after death is not a habile mode of constituting a legacy.[2]

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[1] *Hinton* v. *Connell's Trs.*, 1883, 10 R. 1110; *Henderson* v. *Robb*, 1889, 16 R. 341; *Raes* v. *Meek*, 1888, 15 R. 1033, at p. 1050; 1889, 16 R. (H.L.) 31.

[2] *Watt* v. *Roger's Trs.*, 1890, 17 R. 1201; see *Teulon* v. *Seaton*, 1885, 12 R. 971.

[3] Stair, iii. 8, 39; *cf.* Ersk. iii. 9, 12.

[4] *Hagart* v. *Hagart*, 1834, 13 S. 35; *Tait's Trs.* v. *Lees*, 1886, 13 R. 1104; *Robertson* v. *Broadbent*, 1883, 8 App. Cas. 812, at p. 819.

[5] *Tait's Trs.* v. *Lees, supra; Farmer's Trs.* v. *Taylor*, 1917 S.C. 366.

[6] *Caldwell* v. *Caldwell*, 1736, Mor. 8066.

[7] Ersk. iii. 9, 7; Bell's Prin. (10th ed.), s. 1869.

[8] *Kelly* v. *Kelly*, 1861, 23 D. 703; *Turner's Trs.* v. *M'Fadyen*, 1906, 43 S.L.R. 712; 14 S.L.T. 57.

[9] *Moncrieff* v. *Moncrieff*, 1711, Mor. 13,307.

[10] Dickson on Evidence, s. 633; *Mitchell*, 1744, Elchies "Legacy," No. 13.

[11] *Hannah* v. *Guthrie*, 1738, Mor. 3837, 5 Bro. Supp. 203, Elchies "Legacy" No. 5; *Smiths* v. *Taylor*, 1749, Mor. 6594; cf. *Wilson* v. *Lindsay*, 1878, 5 R. 539; *Melvin* v. *Nicol*, 1824, 3 S. 31. As to English law see *Blackwell* v. *Blackwell*, [1929] A.C. 318.

SECTION 5.—DESTINATIONS IN BONDS, ETC.

258. The succession to the sums contained in stock certificates, bonds, and certificates of debt of public companies, and, in principle, assignations of moveable estate of every description, railway debentures, and insurance policies, may be regulated by the destination contained in these instruments.[3] The rule is different with regard to deposit-receipts.[4] It is now settled that a general disposition and settlement will not operate as a revocation of a prior special destination made by the testator himself but will operate as a revocation of a prior destination made by another person; and that a special destination made by the testator after the date of his settlement is deemed to be the last expression of his will, and is, therefore, outside the scope of the settlement.[5] But these rules are merely presumptions which may be redargued; and if the directions in the general settlement cannot be carried out standing the destinations, or if the provisions of the settlement indicate that the testator regarded the destined shares as included in the estate disposed of in the settlement, this affords strong evidence in favour of the evacuation of the destinations.[6] It would seem that a clause in general terms revoking earlier testamentary writings is not in itself sufficient to operate a revocation of special destinations taken by the testator.[7] In this matter our law is more favourable to the admission of extrinsic evidence than is English law.[8] Where property is purchased by parties who each contribute to the price, and the destination thereof is taken in favour of them jointly and the survivor and the heirs of the survivor, the destination to the survivor may be regarded as contractual, and, therefore, not alterable except with the joint consent of the parties.[9]

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[1] *Forsyth's Trs.* v. *M'Lean*, 1854, 16 D. 343; M'Laren on Wills, i. 573; see also *Turner's Trs.* v. *M'Fadyen*, 1906, 43 S.L.R. 712; 14 S.L.T. 57.

[2] *Milne* v. *Grant's Exrs.*, 1884, 11 R. 887; *Wright* v. *Wright*, 1761, Mor. 8088; *Dowie* v. *Millie*, 1786, Mor. 8107; cf. *M'Gaw's Trs.* v. *King*, 1902, 10 S.L.T. 83.

[3] *Connell's Trs.* v. *Connell's Trs.*, 1886, 13 R. 1175; *Walker's Exr.* v. *Walker*, 1878, 5 R. 965; *Buchan* v. *Porteous*, 1879, 7 R. 211.

[4] *Cuthill* v. *Burns*, 1862, 24 D. 849; *Crosbie's Trs.* v. *Wright*, 1880, 7 R. 823; *Dinwoodie's Exr.* v. *Carruther's Exr.*, 1895, 23 R. 234.

[5] *Campbell* v. *Campbell*, 1880, 7 R. (H.L.) 100; *Glendonwyn* v. *Gordon*, 1873, 11 M. (H.L.) 33; *Dennis* v. *Aitchison*, 1924 S.C. (H.L.) 122; *Perrett's Trs.* v. *Perrett*, 1909 S.C. 522; *Drysdale's Trs.* v. *Drysdale*, 1922 S.C. 741; *Cunningham's Trs.* v. *Cunningham*, 1924 S.C. 581; *Paterson's Judicial Factor* v. *Paterson*, 1897, 24 R. 499.

[6] *Dennis* v. *Aitchison*, *supra*; *Henderson's Trs.*, 1911 S.C. 525; *Turnbull's Trs.* v. *Robertson*, 1911 S.C. 1288; *Walker* v. *Galbraith*, 1895, 23 R. 347; *Morrison's Trs.* v. *Morrison*, 1905, 7 F. 810.

[7] See *Murray's Exrs.* v. *Geekie*, 1929, S.L.T. 524.

[8] *Campbell* v. *Campbell*, 1878, 6 R. 310; rev. 1880, 7 R. (H.L.) 100; *Thoms* v. *Thoms*, 1868, 6 M. 704; *Glendonwyn*, *supra*; *Currie* v. *M'Lennan*, 1899, 1 F. 684.

[9] *Perrett's Trs.* v. *Perrett*, *supra*; *Chalmers' Trs.* v. *Littledale's Trs.*, 1923 S.C. 271; *Renouf's Trs.* v. *Haining*, 1919 S.C. 497.

SECTION 6.—GIFTS BY IMPLICATION.

259. A gift may also be given by implication. Thus if a testator shows that he supposes that he has bequeathed a certain subject, and refers to the bequest as an accomplished fact, and on that assumption proceeds to make a settlement of his affairs, the implication has been held sufficient to sustain the bequest.[1] Similarly, where a testator provided for payment of an annuity of £150 as the annuity provided in a marriage contract, and it turned out that the marriage contract bound him to pay only £100, it was said, "The collocation of this clause in which he mentions the annuity to his widow clearly showing it to be in the region not of debt but of gift, I think the intention of the testator was to confer a bounty, and not merely to discharge an antecedent liability" and the widow was held entitled to the larger annuity.[2] In certain cases, especially in family settlements, a gift has been implied, where there was a clear expression of an intention to make a bequest in the deed although this was not followed by words of gift giving effect to that intention.[3] But the Court will not supply words in a will by implication, unless it clearly appears that the language of the will does not completely express the testator's intention, as collected from the context, and unless also the words which require to be supplied can be gathered from the will.[4] Again, from the terms of a destination-over a gift may (in the absence of words of direct bequest) be implied in favour of issue or other parties on whose failure the destination-over depends.[5] Thus, if a liferent is given to A. and the fee is given to third parties in the event of his death without issue, it has been held that, if A. at his death leaves children, these are by implication entitled to the fee of the liferented subject.[6] Other gifts by implication may be found in the cases undernoted.[7] Where a testator directed his executors to invest £2000 for the benefit of his son and daughter equally, and as to each of the shares to pay the interest thereof, or apply it to the use of his said son and daughter, with the declaration, "I leave it to my executors entirely in what manner to apply these sums, whether to pay the same directly, or apply it and pay it to others for behoof of my son and daughter," there was held to be a bequest of capital.[8] But Scots law has not recognised the rule accepted in the law of England that a bequest of the income of a subject, without any limit as to its duration, and without any disposition of the capital, implies a gift of the capital to the donee of the income.[1] Nor is the rule of English law that, if a testator destines his estate to his heir-at-law or his next-of-kin, after the death of a certain person, there is an implied gift of a life interest to that person adopted in the law of Scotland; although the opinion has been expressed that it might be applied in appropriate circumstances.[2]

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[1] *Grant* v. *Grant*, 1851, 13 D. 805; contrast *Law's Trs.* v. *Gray*, 1921 S.C. 455.

[2] *Forbes' Trs.* v. *Forbes*, 1895, 20 R. 248.

[3] *Mearns* v. *Mearns*, 1775, Mor. 13,050; *M'Gowan* v. *Jaffray*, 1842, 4 D. 1546; cf. *Murdoch* v. *Brass*, 1904, 6 F. 841.

[4] *Crawford's Trs.* v. *Fleck*, 1910 S.C. 998; see also *Burgh Smeaton* v. *Burgh Smeaton's Judicial Factor*, 1907 S.C. 1009; *Scott's Trs.* v. *Bruce*, 1912 S.C. 105; *Ainslie's Trs.* v. *Imlach's Exrs.*, 1926, S.L.T. 28.

[5] *Aberdein's Trs.* v. *Aberdein*, 1870, 8 M. 750; see also *Neville* v. *Shepherd*, 1895, 23 R. 351.

[6] *Douglas* v. *Douglas*, 1843, 6 D. 318; *Campbell* v. *Campbell*, 1852, 15 D. 173.

[7] *Wedderburn* v. *Scrimgeour*, 1666, Mor. 6587; *Countess of Cromarty* v. *The Crown*, 1764, Mor. 6601; *Flett's Trs.* v. *Elphinston*, 1900, 38 S.L.R. 564.

[8] *Sanderson's Exr.* v. *Kerr*, 1860, 23 D. 227; *Lawson's Trs.* v. *Lawson*, 1890, 17 R. 1167.

Section 7.—Subject of the Gift.

Subsection (1).—*General.*

260. Words descriptive of the subject of the gift will be interpreted in their strict and primary sense, unless there is something in the deed to show that they have been used by the testator in another sense. But the general principle of construction, known as the *ejusdem generis* rule,[3] by which general words following particular and specific words may be confined to things of the same class as those described by the earlier words is applicable to the interpretation of testamentary deeds.[4] Thus, if the specified articles are all moveable, the subsequent general terms (unless unequivocally referable to heritage) may be confined to the moveable estate; [5] and a bequest of the testator's "whole moveable estate" has been read as carrying only corporeal moveables when preceded by an enumeration of articles of that nature.[6] On the other hand, if the general words follow an enumeration of particular subjects which do not form a *genus*, they receive effect according to the natural meaning of the words.[7]

Subsection (2).—Legatum liberationis.

261. This is the name given to the bequest to a debtor of the amount of his debt. It has been held that a bequest to debtors of "a free discharge of everything they may owe me at my death" did not comprehend sums coming into their hands on behalf of the testator and for which they were liable to account to him.[1] A legacy of the forgiveness of debt has been held in England to be a specific legacy.[2]

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[1] *Sim* v. *Duncan*, 1900, 2 F. 434; *Mackenzie's Tr.* v. *Mackenzie*, 1899, 2 F. 330; see Jarman on Wills, ii. 1185.

[2] *Bate's Tr.* v. *Bate*, 1906, 8 F. 861, per Lord Low. For the rule in England, see Theobald on Wills, 8th ed., pp. 820 and 822: a life interest is not implied if the destination on the person's death is to others than the testator's heir or next-of-kin.

[3] The rule is illustrated more fully in its application to statutes (see Craies on Statute Law, 3rd ed., p. 163) and contracts (Gloag on Contract, 2nd ed., p. 403). See *The Admiralty* v. *Burns*, 1910 S.C. 531; *Crichton Stuart* v. *Ogilvie*, 1914 S.C. 888; *Moss's Empires* v. *Assessor for Glasgow*, 1917 S.C. (H.L.) 1, per Viscount Haldane.

[4] *Oag's Curator* v. *Corner*, 1885, 12 R. 1162, per Lord Young; see also *Mackie* v. *Mackie's Trs.*, 1883, 11 R. 255.

[5] *Paterson* v. *Farish*, 1800, Hume, 128; *Edmond* v. *Edmond*, 1873, 11 M. 348.

[6] *Carswell* v. *Carswell*, 1858, 20 D. 516; see also *Dunbar's Trs.* v. *Dunbar*, 1808, Hume, 267; *Ker* v. *Young*, 1745, Mor. 2274.

[7] See *Welsh* v. *Cairnie*, 28th June 1809, F.C.; *Glover* v. *Brough*, 7th December 1810, F.C., and cases cited in note 3, *supra*.

SUBSECTION (3).—Legatum rei alienæ.

262. This is the bequest of a subject that does not belong to the testator. If he did not know that the thing was another's, which, *in dubio*, is to be presumed,[3] the legacy fails. But if he knew that it was not his own, the legacy is good, on the principle that the bequest is equivalent to an instruction to the executor to buy the subject for the legatee or pay him its value, and this the executor must do. The same, or a similar, principle governed bequests of subjects which could not, under the old law, be disposed of by testament,[4] and has been applied to a bequest by a testator of a subject at one time belonging to, but assigned by, him prior to the execution of the testament.[5]

SUBSECTION (4).—*Bequest of Heritage.*

263. Prior to the Conveyancing Acts of 1868[6] and 1874,[7] heritage was not transmissible by testament, but even before these Acts a bequest of heritage could in certain circumstances be validly made. By s. 20 of the Consolidation Act of 1868[6] it is provided that where any deed contains, with reference to lands, any words which would, if used in a will with reference to moveables, be sufficient to confer upon the executor of the grantor, or upon the grantee or legatee of such moveables, a right to claim the same, such deed (if duly executed in the manner required in the case of testamentary writings) shall be taken to be equivalent to a general disposition of such lands in favour of the grantee or of the legatee of such lands, and shall create, in favour of such grantee or legatee an obligation upon the successors of the grantor to make up titles in their own persons to such lands, and to convey them to such grantee or legatee. It was made competent for such grantee or legatee to complete his title to such lands in the same manner and to the same effect as if such deed or writing had been such a general disposition in his favour, and that either by notarial instrument or in any other manner competent to a general disponee.[7] The deed must purport to convey heritage. "The only difference" made by the statute "is that it is no longer a question of technicality, but of common construction, whether heritage was intended to be carried or not."[8] Its effect is that a bequest of heritage and a bequest of moveables are placed in precisely the same position as regards formality of conveyance.[1] Accordingly no particular form of words is required to operate a conveyance of heritage; and "although there are no direct words of gift, yet if the deed, taken as a whole, clearly imports an intention on the part of the testator to make a conveyance of heritage belonging to him, that is enough." [2] If words importing a gift are used, and the words employed describe either heritable property in particular, or the testator's whole estate without distinguishing between heritable and moveable, the will will be held sufficient to carry heritage.[3] A bequest of "all my property" or "my whole estate" will include the testator's heritable property unless it appears from the context that the words are used in a restricted sense.[4] So also a bequest of "my belongings" was held in *Simson's Trs.* v. *Simson* [5] to carry heritage. The construction of the word "residue" depends on whether it is to be gathered from the will that the testator meant, on the one hand, what remained of his whole estate, or, on the other, the remainder of his moveable property.[6] The words "effects" [7] and "money" (which may be read as including the whole moveable estate [8]) are not appropriate words for the conveyance of heritage; but in *Forsyth* v. *Turnbull* [9] the former, and in *Ord* v. *Ord*,[10] the latter word was by virtue of the context held to include certain heritable property. The undernoted cases deal with the question whether words of bequest will or will not carry heritage.[11]

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[1] *Graham* v. *Denniston*, 1792, Mor. 8108.

[2] *In re Wedmore*, [1907] 2 Ch. 277; see also M'Laren on Wills and Succession, vol. i. s. 1043.

[3] Ersk. iii. 9, 10.

[4] *Falconer* v. *Dougal*, 1664, Mor. 13,301; *Cranston* v. *Brown*, 1674, Mor. 8058; see also *Douglas' Trs.* v. *Douglas*, 1862, 24 D. 1191; *Crum-Ewing's Trs.* v. *Bayly's Trs.*, 1911 S.C. (H.L.) 18, at p. 28.

[5] *Meeres* v. *Dowell's Exr.*, 1923, S.L.T. 184.

[6] 31 & 32 Vict. c. 101.

[7] See also s. 27 of the Conveyancing Act, 1874 (37 & 38 Vict. c. 94).

[8] *Hardy's Trs.*, 1870, 9 M. 736, per Lord Neaves; *Pitcairn* v. *Pitcairn*, 1870, 8 M. 604; *Edmond* v. *Edmond*, 1873, 11 M. 348.

SUBSECTION (5).—*Interpretation of Particular Words.*

264. "Goods, gear, and sums of money" will carry corporeal moveables, not debts.[12] "Goods, gear, debts, etc.," were held not to carry heritable debts secured by adjudication.[13] "Goods and gear, whether heritable or moveable," have been held not to carry a lease.[1] "Cash" includes current coins and bank notes, but not bonds, bills, or securities.[2] "Money wherever deposited" was held equivalent to the residue of the moveable estate.[3] "Free money" was held to include moveable funds (not merely cash in bank), less debts, but not legacies; [4] and "money in bank" a deposit receipt,[5] but not money lodged in bank without the testator's knowledge.[6] "Carriages" has been held to include motor cars.[7] "Furniture" includes articles of domestic use, but not books or wines or liquors in the house.[8] "The whole of the furniture in her own bedroom and any other she may choose for furnishing her house" was held to give the legatee a power of choosing liberally, but fairly, similar articles to those in her own bedroom.[9] Where a testator disposed separately of his heritable and moveable estate, "moveable estate" was construed as including heritable bonds, because they are moveable *quoad* succession.[10] In the general case a bequest of "shares" will carry "stock." [11]

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[1] *M'Leod's Trs.* v. *M'Leod*, 1875, 2 R. 481; *Urquhart* v. *Dewar*, 1879, 6 R. 1026.

[2] Per Lord Pres. Inglis in *M'Leod's Tr.* v. *M'Luckie*, 1883, 10 R. 1056; *Campbell* v. *Campbell*, 1887, 15 R. 103.

[3] Lord Kinnear in *Jack's Exr.* v. *Downie*, 1908 S.C. 718.

[4] *Jack's Exr.* v. *Downie*, *supra*; *Copland's Exrs.* v. *Milne*, 1908 S.C. 426; *Smith's Exrs.* v. *Smith*, 1918 S.C. 772; *Craw's Trs.* v. *Blacklock*, 1920 S.C. 22; *Grant* v. *Morren*, 1893, 20 R. 407; *Oag's Curator* v. *Corner*, 1885, 12 R. 1162.

[5] 1922 S.C. 14.

[6] *Crowe* v. *Cook*, 1908 S.C. 1178; *Smith's Exrs.* v. *Smith*, *supra*; *Bryden* v. *Cormack*, 1913 S.C. 209; *Woodard's Judicial Factor* v. *Woodard*, 1919 S.C. 350.

[7] *Pitcairn* v. *Pitcairn*, 1870, 8 M. 604; *Edmond* v. *Edmond*, 1873, 11 M. 348; *Griffith's Judicial Factor* v. *Griffith's Exrs.*, 1905, 7 F. 470; *M'Innes* v. *Hill*, 1912, 1 S.L.T. 80; *Bryden* v. *Cormack*, *supra*, per Lord Dundas.

[8] *Easson* v. *Thomson's Trs.*, 1879, 7 R. 251.

[9] 1887, 15 R. 172.

[10] 1927 S.C. 77.

[11] *Oag's Curator* v. *Corner*, *supra*; *Aim's Trs.* v. *Aim*, 1880, 8 R. 294; *Ford's Trs.* v. *Ford*, 1884, 11 R. 1129; *Farquharson* v. *Farquharson*, 1875, 3 R. 71; *Forsyth* v. *Turnbull*, 1887, 15 R. 172; *Studd* v. *Cook*, 10 R. (H.L.) 53; *Jack's Exr.* v. *Downie*, *supra*; *Copland's Exrs.* v. *Milne*, *supra*; *Crowe* v. *Cook*, *supra*.

[12] *Mochrie* v. *Linn*, 1736, Mor. 5018; *Brown* v. *Henderson*, 1805, Mor. "Clause," App. No. 5.

[13] *Ross* v. *Ross*, 1771, 2 Pat. 254; *Galloway*, 12th January 1802, F.C.; Mor. 15,950; *Crawford* v. *Earl of Dundonald*, 1838, 16 S. 1017.

SUBSECTION (6).—Falsa demonstratio.

265. *Falsa demonstratio non nocet cum de corpore constat.*—If the testator has incorrectly described the subject which he means to give, but has nevertheless characterised it in such a way that it can be identified, the bequest will receive effect.[12] Provided the description is sufficient to render certain what is intended, the addition of a wrong name or of an erroneous statement as to quantity, occupancy, locality, or an erroneous enumeration of particulars will have no effect.[13] For the purpose of determining the subject of the disposition the Court may inquire into every material fact relating to the property which is claimed as the subject of the disposition, and to the circumstances of the testator and of his family and affairs for the purpose of enabling the Court to identify the thing intended by the testator. Thus a bequest of all the gas shares bought by the testator for £300 from certain trustees was held to carry all the shares bought from the trustees, although these had cost £798, and not £300.[14] So also an error in the statement of the proportions into which the estate is to be divided has been held not to invalidate the bequest. Thus where one-third of an estate was left to one person, two-thirds to another, and one-third to another, it was held that by thirds fourths were meant.[1] If it is found impossible to ascertain the subject of the legacy, or if, in the case of a pecuniary legacy, the amount is left uncertain, the legacy will fail.[2]

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[1] *Sutherland* v. *Jeffrey*, 1805, Hume 133; *Paterson* v. *Farish*, 1800, Hume 128.

[2] *Jarvie* v. *Pearson*, 1860, 22 D. 1395.

[3] *Easson* v. *Thomson's Trs.*, 1879, 7 R. 251; *Dunsmure* v. *Dunsmure*, 1879, 7 R. 261.

[4] *Smith* v. *Donaldson*, 1829, 7 S. 734.

[5] *Harper's Trs.* v. *Harper's Trs.*, 1903, 5 F. 716.

[6] *Masson* v. *Smellie*, 1903, 6 F. 148.

[7] *Denholm's Trs.* v. *Denholm*, 1908 S.C. 43.

[8] Bell's Prin., s. 1872; *Miller's Trs.* v. *Miller*, 1907 S.C. 833.

[9] *Reed* v. *Lord Strathallan*, 1835, 13 S. 810; see *Macdonald's Trs.* v. *Bain's Trs.*, 1896, 23 R. 913.

[10] *Cunningham* v. *Cunningham*, 1889, 17 R. 218; *Hughes' Trs.* v. *Carsane*, 1890, 18 R. 299.

[11] *Barr's Trs.* v. *Ardrossan Castle Curling Club*, 1901, 3 F. 903.

[12] Bell's Prin., s. 1880; see also para. 268, *infra*, as to errors in the description of the object of the bequest.

[13] See Lord Sumner's speech in *Eastwood* v. *Ashton*, [1915] A.C. 900, at p. 914.

[14] *Bruce's Trs.* v. *Bruce*, 1875, 2 R. 775; *Donald's Trs.* v. *Donald*, 1864, 2 M. 922.

SUBSECTION (7).—*Legacy by Heir of Entail of Charge on Entailed Estate.*

266. By the Entail Amendment Act, 1875, s. 11,[3] as amended by the Entail Act of 1882,[4] an heir of entail in possession may charge the entailed estate for improvement expenditure by granting a bond and disposition in security for three-fourths of the amount authorised to be borrowed: if he dies without doing so, anyone to whom he has bequeathed his right may have the heir in possession ordained to grant a bond and disposition in security for the amount with which the deceased might have charged the estate. It has been held that the legatee is entitled to three-fourths only of the amount expended, and three-fourths of the actual or estimated expenses of the application to secure the bond.[5]

SECTION 8.—OBJECT OF THE GIFT.

SUBSECTION (1).—*Identification of Legatee.*

267. It is essential for the validity of a legacy that the legatee should be so described as to make it possible to identify him, otherwise the legacy will fail on the ground of uncertainty.[6] Nor does the law permit anyone to delegate to another the power of making a will for him. But it is open to a testator to point out the classes of persons or objects which he intends to favour, leaving it to an individual or body of individuals to select out of these classes the particular persons or objects to whom his bounty is to be applied, and in that case, provided the classes within which the power of selection is to be exercised are sufficiently defined, the bequest will be valid.[7] Thus bequests for "any of the testator's blood relations" that his wife should think the most fit; to "such of the truster's mother's relations as his trustees should appoint"; "to such of his friends and relations as should be pointed out by his wife," and other similar bequests, have been sustained.[1] Whether a discretionary power of this kind can be exercised by assumed trustees [2] or by a judicial factor appointed on a trust estate [3] depends on whether it does or does not appear from the truster's deed that his intention was to confine the power to the trustees appointed by himself. In a case in which power to select the beneficiaries had been conferred on two out of four trustees it was held that on the death of one of these the power could not be exercised by the survivor.[4]

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[1] *Smith's Trs.* v. *Smith*, 1883, 10 R. 1144; *cf.* also *Russell's Trs.*, 1902, 9 S.L.T. 321; *Forbes' Trs.* v. *Forbes*, 1893, 20 R. 248.

[2] M'Laren on Wills and Succession, i. 354; *Mags. of Dundee* v. *Morris*, 1858, 3 Macq. 134, per Lord Wensleydale. See *Stewart* v. *Stewart*, 26th November 1813, F.C.; *Campbell* v. *Campbell*, 1738, Mor. 4076; *Macduff* v. *Spence's Trs.*, 1909 S.C. 178, as to discretionary powers of trustees.

[3] 38 & 39 Vict. c. 61.

[4] 45 & 46 Vict. c. 53. s. 4.

[5] *Leith* v. *Leith*, 1888, 15 R. 944; *Earl of Kinnoull* v. *Haldane*, 1911 S.C. 1279; *Shepherd's Exrs.* v. *Mackenzie*, 1913 S.C. 144.

[6] *Murdoch* v. *Brass*, 1904, 6 F. 841; see also *Sprot* v. *Pennycook*, 1855, 17 D. 840.

[7] *Crichton* v. *Grierson*, 1828, 3 W. & S. 323, per Lord Lyndhurst at p. 329.

268. Again, it may be that, while the terms of the bequest make it certain that the testator desired to favour some particular person or institution, the manner in which he describes the object of his bounty does not with complete accuracy apply to any person or institution. In such cases the rule is that the legacy will not fail *dummodo constet de persona*, and (as in the case of similar errors of description *quoad* the subject of the gift) [5] the Court will resort to evidence in order to ascertain the person who was intended by the description in the bequest. Thus a legacy was sustained although both the Christian and married names of the legatee were wrongly given.[6] So also a legacy to "my late brother James's son" was held effectual though the only child of James was a daughter.[7] And although the description in the will may accurately fit one society in all respects, yet if there be a second society to whom it may apply but not with complete accuracy, evidence of facts and circumstances may be admitted to ascertain the application of the description; but cogent evidence will be required in order that the second society may be preferred to the first.[8] Again, where legacies were left to each of the daughters procreate of the marriage betwixt A. B. and C. D. £400, the summation of these legacies being stated as £1200, and there were four daughters, each was held entitled to £400.[9] The principle applied in the last-mentioned cases is that if there is a dominant intention to favour a class, or persons answering a certain description, an inaccurate enumeration of the class or persons will be disregarded, and the legacy will be payable to the class.[1]

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[1] *Murray* v. *Fleming*, 1729, Mor. 4075; *Wharrie* v. *Wharrie*, 1760, Mor. 6599; *Snodgrass* v. *Buchanan*, 1806, Mor. "Service of Heirs," App. No. 1; *Brown's Trs.* v. *His Relations*, 1762, Mor. 2318; *Cairnie* v. *Cairnie's Trs.*, 1837, 16 S. 1; *Crichton* v. *Grierson*, 1828, 3 W. & S. 323. The question whether a testator has sufficiently defined the class from which the object of his bounty is to be selected has been most frequently considered in the case of bequests of a public or charitable nature. See CHARITABLE TRUSTS, paras. 479–488, Vol. III. p. 219.

[2] *Shedden's Tr.* v. *Dykes*, 1914 S.C. 106; *M'Credie's Trs.* v. *M'Credie*, 1915, 1 S.L.T. 410; *Miln's Trs.* v. *Drachenhauer*, 1921, 1 S.L.T. 152. See also *Hedderwick's Trs.* v. *Hedderwick's Exr.*, 1910 S.C. 333, and *Hill's Trs.* v. *Thomson*, 1874, 2 R. 68.

[3] *Robbie's Judicial Factor* v. *Macrae*, 1893, 20 R. 358; *Woodard's Judicial Factor* v. *Woodard*, 1926 S.C. 534.

[4] *Paterson's Trs.* v. *Finlay*, 1918 S.C. 713.

[5] See para. 260 *et seq.*, *supra*.

[6] *Keiller* v. *Thomson's Trs.*, 1824, 3 S. 396; see also *Johnstone's Exrs.* v. *Johnstone*, 1902, 10 S.L.T. 42; *Jaffrey's Trs.* v. *Society for Prevention of Cruelty to Animals*, 1903, 10 S.L.T. 651; *Allison* v. *Anderson*, 1907, 15 S.L.T. 529; *M'Grouther's Trs.* v. *Lord Advocate*, 1907, 15 S.L.T. 652.

[7] *Macfarlane's Trs.* v. *Henderson*, 1878, 6 R. 288.

[8] *Nasmyth's Trs.* v. *National Society for Prevention of Cruelty to Children*, 1914 S.C. (H.L.) 76, per Lord Dunedin.

[9] *Maclehose* v. *Boglas*, 28th February 1815, F.C.; *Bryce's Tr.*, 1878, 5 R. 722; *Millar's Trs.* v. *Rattray*, 1891, 18 R. 989; *Lumsden's Trs.* v. *Lumsden*, 1921, 1 S.L.T. 155.

SUBSECTION (2).—*Gifts to a Class or to Individuals not named.*

(i) *General Rules of Interpretation.*

269. In the case of gifts to individuals or classes of individuals the following general rules obtain:—

1. Where the individuals are called under a term denoting relationship, this term will *prima facie* comprehend only individuals related in legitimate kinship. Thus a bequest to "children" will include lawful children only,[2] unless there is something in the will or in the surrounding circumstances which points to a different intention.[3]

2. The members of the class are to be ascertained at the date appointed in the will for payment or division of the fund bequeathed.[4] Thus if the testator direct that a sum shall be paid at his death to the children of A., only those children of A. then alive will be entitled to participate [5] in the bequest; if the sum is bequeathed to A. in liferent and his children in fee, all the children born before the close of the liferent will take; [6] and if the sum is bequeathed to the children of A. on majority, the share of each child being payable on his or her majority, those children only who are alive when the eldest child becomes twenty-one will share in the gift.[7] In the case of a sum which is contemplated as being divisible among a class in portions at different times, the members of the class in existence, when any portion comes to be divided,

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[1] *In re Sharp*, [1908] 2 Ch. 190.

[2] *Mitchell's Trs.* v. *Cables*, 1893, 30 S.L.R. 969; *Gowanlock's Trs.* v. *Gowanlock*, 1895, 3 S.L.T. 163; *M'Donald's Trs.* v. *Gordon*, 1909, 2 S.L.T. 321.

[3] *Sharp's Trs.* v. *Sharp*, 1894, 2 S.L.T. 124; *Allan* v. *Adamson*, 1902, 9 S.L.T. 404; *Gentle's Trs.* v. *Bunting*, 1908, 16 S.L.T. 437; *Purdie's Trs.* v. *Doolan*, 1929, S.L.T. 273. In *Burns's Trs.* v. *Burns*, 1917 S.C. 117, a bequest to the children of A. alive at the testator's death was held not to include illegitimate children of A. then alive who were subsequently legitimated. In the case of *Hill* v. *Crask*, 1873, L.R. 6 H.L. 265 (which has been frequently referred to in the Scottish cases), Lord Cairns stated that there were two exceptions to the rule that illegitimate children do not take under a bequest to children, viz. (1) "when it is impossible from the circumstances of the parties that any legitimate children could take under the bequest," and (2) "where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the word 'children,' not merely according to its *prima facie* meaning of legitimate children, but according to a meaning which will apply to and which will include 'illegitimate children.'" (See also *Dorin* v. *Dorin*, 1875, L.R. 7 H.L. 568.) These are the only exceptions recognised in English law. (*In re Pearce*, [1914] 1 Ch. 254; *In re Taylor*, [1925] 1 Ch. 739.)

[4] *Wood* v. *Wood*, 1861, 23 D. 338; *Davidson's Exrs.* v. *Davidson*, 1871, 9 M. 995; *Ross* v. *Dunlop*, 1878, 5 R. 833; *Murray's Trs.* v. *Murray*, 1919 S.C. 552.

[5] *Hayward's Exrs.* v. *Young*, 1895, 22 R. 757; *Wood* v. *Wood*, *supra*: *Stafford Blair's Exrs.* v. *Heron Maxwell's Trs.*, 1872, 10 M. 760.

[6] *Carleton* v. *Thomson*, 1867, 5 M. (H.L.) 151; *Simpson* v. *Marshall*, 1900, 2 F. 447: *Hay Cunningham's Trs.* v. *Blackwell*, 1909 S.C. 219; *Hickling's Trs.* v. *Garland's Trs.*, 1898, 1 F. (H.L.) 7, per Lord Davey at p. 19.

[7] *Scott's Trs.* v. *Scott*, 1909 S.C. 773; *Buchanan's Trs.* v. *Buchanan*, 1877, 4 R. 754; *Howden's Trs.* v. *Macpherson*, 1911, 2 S.L.T. 308. See also *Hope Johnstone* v. *Sinclair's Trs.*, 1904, 7 F. 25.

are entitled to participate in that portion.[1] In all questions as to legacies a child *in utero* is (in the absence of indications of a contrary intention) considered as already born.[2]

(ii) *Terms descriptive of Relationship.*

270. The word "issue" includes all direct descendants [3] unless there is something in the context to shew that it includes children only.[4] "Descendants" includes all relatives in the direct descent.[5] "Children" refers to issue of the first generation and does not include grandchildren; [6] and (although a wider interpretation has been given to the term [7]) a bequest to the "family" of a person includes only the sons and daughters of that person.[8] "Cousins" applies to first cousins only; [9] in special circumstances a legacy to "second cousins" was held to apply to first cousins once removed.[10] "Relations" has been construed as including all relations, however remote, on the father's or mother's side; [11] in other cases it has been treated as limited to heirs *ab intestato*.[12] In ordinary circumstances only those related by blood (and not by affinity) are included.[13]

(iii) *Heirs, Next of Kin, Executors, Assignees.*

271. "In cases where a testator or settlor, in order to define the persons to whom he is making a gift, employs language commonly descriptive of a class ascertainable at the time of his own death, he must *prima facie*, and in the absence of expressions indicating a different intention, be understood to refer to that period for the selection of the persons whom he means to favour." [14] In accordance with this rule, under a bequest by a testator to his own "heirs" or "next of kin," the legatees are to be ascertained as at the testator's death and not at the time when the legacy may happen to become payable. Since the passing of the Intestate Moveable Succession Act, 1855, the expression "heirs" has not the same meaning as "next of kin," for the latter term does not include the heirs who owe their right of succession to that statute.[1] The expression "nearest heirs" has been construed as meaning simply "heirs."[2] A bequest by a testator to his "next of kin" will not entitle his mother to claim, as she was not among the next of kin entitled to succeed under the common law.[3]

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[1] *Ross* v. *Dunlop*, 1878, 5 R. 833 ; *Potter's Trs.* v. *Allan*, 1918 S.C. 173.

[2] *Mountstewart* v. *Mackenzie*, 1707, Mor. 14903 ; *Grant* v. *Fyffe*, 22nd May 1810, F.C. ; *Murray's Trs.* v. *Murray*, 1919 S.C. 552 ; *Villar* v. *Gilbey*, [1907] A.C. 139. Contrast *Burns' Trs.* v. *Burns*, 1917 S.C. 117, with *In re Salaman*, [1908] 1 Ch. 4.

[3] *Macdonald* v. *Hall*, 1893, 20 R. (H.L.) 88 ; *Turner's Trs.* v. *Turner*, 1897, 24 R. 619 ; *Wilson's Trs.* v. *Wilson*, 1901, 3 F. 967 ; *Dalziel* v. *Dalziel's Trs.*, 1905, 7 F. 545 ; *Stewart's Trs.* v. *Whitelaw*, 1926 S.C. 701. *Contra*, *Young's Trs.* v. *M'Nab*, 1883, 10 R. 1165, per Lord Shand.

[4] *Cattanach's Trs.* v. *Cattanach*, 1901, 4 F. 205 ; *Bannerman* v. *Bannerman's Trs.*, 1906, 13 S.L.T. 754 ; *M'Murdo's Trs.* v. *M'Murdo*, 1897, 24 R. 458 ; *Young's Trs.* v. *M'Nab*, *supra*.

[5] *Ralph* v. *Carrick*, 1879, 11 Ch. D. 873.

[6] *Adams's Trs.* v. *Carrick*, 1896, 23 R. 828 ; *Adam's Exr.* v. *Maxwell*, 1921 S.C. 418.

[7] *Irvine* v. *Irvine*, 1873, 11 M. 892.

[8] *Low's Trs.* v. *Whitworth*, 1892, 19 R. 431 ; *Searcy's Trs.* v. *Allbuary*, 1907 S.C. 823 ; *Greig's Trs.* v. *Simpson*, 1918 S.C. 321 ; *Phillip's Trs.* v. *Davies*, 1910, 2 S.L.T. 161.

[9] *Copland's Exrs.* v. *Milne*, 1908 S.C. 426.

[10] *Drylie's Factor* v. *Robertson*, 1882, 9 R. 1178.

[11] *Wharrie* v. *Wharrie*, 1760, Mor. 6599 ; *Brown's Trs.* v. *His Relations*, 1762, Mor. 2318 ; *Tait's Trs.* v. *Bannatyne*, 1894, 2 S.L.T. 168.

[12] *Scott* v. *Scott*, 1855, 2 Macq. 281 ; *Williamson* v. *Gardiner*, 1865, 4 M. 66 ; *Cunningham's Trs.* v. *Cunningham*, 1891, 18 R. 380 ; *Johnston's Trs.* v. *Johnston*, 1891, 18 R. 823 ; *Thomson's Trs.* v. *Thomson*, 1903, 11 S.L.T. 67.

[13] *Stewart's Trs.* v. *Stewart*, 1917, 2 S.L.T. 267, per Lord Cullen.

[14] *Gregory's Trs.* v. *Alison*, 1889, 16 R. (H.L.) 10, per Lord Watson ; *Anderson's Trs.* v. *Forrest*, 1917 S.C. 321.

272. In the case of a bequest by a testator to his own heirs or the heirs of another, the word "heir" is construed *secundum subjectam materiem*. If the subject of the bequest be heritable, the heir-at-law is entitled to it, and, on the other hand, if it be moveable, the heirs *in mobilibus*. When the subject consists of both heritable and moveable property it will suffer division between the heir-at-law and the heirs *in mobilibus*,[4] with a right of collation on the part of the heir-at-law.[5]

273. Where a bequest is made to a legatee and his "heirs and executors" this expression is held to refer to his legal heirs and not to his executors nominate,[6] unless a clear intention to the contrary is to be discovered in the deed.[7] The term "assignees" used in a destination-over in connection with heirs or executors means those to whom the institute may, in the event of his coming to have a vested right, have assigned his right;[8] it does not (unless the context requires that this meaning shall be given to it[9]) entitle the legatee to pass on the legacy without having himself acquired a vested right.

(iv) *Servants.*

274. Where a bequest was left to each of the testator's servants who should be in his service at the time of his death, a claimant who proved that she had taken charge of the place of business of his firm, and had been accustomed to wait on him there and had sometimes assisted at his residence, was found entitled to share in the bequest.[1] For further decisions as to such legacies the cases undernoted may be referred to.[2]

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[1] *Gregory's Trs.* v. *Alison*, 1889, 16 R. (H.L.) 10; *Young's Trs.* v. *James*, 1880, 8 R. 242; *Murray's Factor* v. *Melrose*, 1910 S.C. 924; *Steedman's Trs.* v. *Steedman*, 1916 S.C. 857. But in *Tronson* v. *Tronson*, 1884, 12 R. 155, and *Rutherford's Trs.* v. *Dickie*, 1907 S.C. 1280, when the bequest was to next of kin " entitled to succeed to my estate had I died intestate," or " according to the law of moveable succession," the addition of these words was held to have the effect of giving the whole expression the meaning of " heirs *in mobilibus*."

[2] See *Smith's Trs.* v. *Macpherson*, 1926 S.C. 983.

[3] *Honeyman's Trs.* v. *Donaldson*, 1900, 2 F. 539.

[4] *Blair* v. *Blair*, 1849, 12 D. 97; *Nimmo* v. *Murray's Trs.*, 1864, 2 M. 1144; *Mitchell's Trs.* v. *Waddell*, 1872, 11 M. 206; *Cunningham* v. *Cunningham*, 1889, 17 R. 218; *Brown's Trs.* v. *Brown*, 1890, 17 R. 1174; *Renton's Trs.* v. *M'Culloch*, 1881, 19 S.L.R. 216.

[5] *Grant's Trs.* v. *Slimon*, 1925 S.C. 261.

[6] *Lady Kinnaird's Trs.* v. *Ogilvy*, 1911 S.C. 1136; *Mackenzie's Trs.* v. *Georgeson*, 1923 S.C. 517; M'Laren on Wills, 3rd ed., ii. 767, and cases there cited.

[7] As in *Scott's Exrs.* v. *Methven's Exrs.*, 1890, 17 R. 389, approved *Montgomery's Trs.* v. *Montgomery*, 1895, 22 R. 824. As to the construction of " personal representatives," see *Stewart* v. *Stewart*, 1802, Mor. " Clause," App. No. 4, and *Manson* v. *Hutcheon*, 1874, 1 R. 371.

[8] *Bell* v. *Cheape*, 1845, 7 D. 614.

[9] *Barr* v. *Parnie*, 1903, 11 S.L.T. 426; see Lord Hunter's opinion in *Wilson's Trs.* v. *Mackenzie*, 1924 S.C. 568.

(v) *Trustees and Executors of Testator.*

275. In English law "a general or specific legacy given by a testator to his executors, whether under the title of executors or not, is *prima facie* given to them in that character, and therefore they are not entitled to the legacies if they decline or are incapable of undertaking the office." [3] There is little authority on this point in Scots law. The decisions in *Scrimgeour* v. *Wedderburn* [4] and *Leckie* v. *Renny* [5] are in accordance with the English rule. In the more recent cases [6] the question was determined on the terms of the bequest without reference to any general rule.

SUBSECTION (3).—Per capita *or* per stirpes.

276. The question whether in a bequest to a number of persons the division among the legatees is to be *per capita* or *per stirpes* depends on the terms in which the bequest is made and the frame of the settlement. *Prima facie* the division is *per capita.*[7] It is not sufficient to displace the presumption in favour of this mode of division that the legatees are called under class descriptions, as *e.g.* the children of A. and the children of B.,[8] or that some of the legatees are called by such a description and others *nominatim*, as *e.g.* A. and the children of B.[9] But where the legacy is in favour of a number of persons in liferent and their issue respectively in fee, the connection of the bequests in liferent and fee is held to indicate a division *per stirpes* among the fiars; [10] and, under a conditional institution of issue in room of their parents, the issue take among them the parents' share and not *per capita* with the other legatees.[11] So also a direction to trustees to divide a sum among "the families" of certain persons has been construed as importing a division *per stirpes.*[12] The repetition of the word "equally"—as *e.g.* in a direction that a sum is to be divided equally between A. and the children of B. equally—where it can be read as importing two equal divisions, points to a stirpital division, as otherwise no more than one division would be necessary.[1] In strictness the word "between" denotes a division into two, "among" a division into more than two portions, but the fact that the strict meaning is not always observed in popular usage has been recognised in the decisions as depriving the argument from these terms of much of its force.[2]

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[1] *M'Intyre* v. *Fairrie's Trs.*, 1863, 2 M. 94.

[2] *Brown* v. *Maxwell's Trs.*, 1884, 11 R. 821; *Stirling Maxwell's Exrs.* v. *Grant*, 1886, 13 R. 854; *Young* v. *Dick's Trs.*, 1904, 12 S.L.T. 20.

[3] Theobald on Wills, 8th ed., p. 383.

[4] 1675, Mor. 6357. See Stair, i. 6, 6.

[5] 1748, Mor. 6347.

[6] *Henderson* v. *Stuart*, 1825, 4 S. 309; *Mellis's Trs.* v. *Legge's Exr.*, 1898, 25 R. 954; *Michie's Exrs.* v. *Michie*, 1905, 7 F. 509; *Wilson's Trs.* v. *Wilson*, 1909, 1 S.L.T. 124.

[7] M'Laren on Wills, ii. 780; *Allen* v. *Flint*, 1886, 13 R. 975, per Lord M'Laren.

[8] *M'Kenzie* v. *The Legatees of Holte*, 1781, Mor. 6602; *Bogie's Trs.* v. *Christie*, 1882, 9 R. 453.

[9] *M'Courtie* v. *Blackie's Children*, 1812, Hume 270; *Hay Cunningham's Trs.* v. *Blackwell*, 1909 S.C. 219; *Robertson's Trs.* v. *Horne*, 1921 S.C. 817, per Lord Pres. Clyde.

[10] *Home's Trs.* v. *Ramsays*, 1884, 12 R. 314; *Low's Trs.* v. *Whitworth*, 1892, 19 R. 431.

[11] *Thomson* v. *Cumberland*, 16th November 1814, F.C.; *Laing's Trs.* v. *Sansom*, 1879, 7 R. 244.

[12] *Searcy's Trs.* v. *Allbuary*, 1907 S.C. 823; see also *Low's Trs.* v. *Whitworth*, *supra*.

Section 9.—Conditional Institution and Substitution.

277. A legatee is said to be conditionally instituted when the gift is made to him on the failure of a prior legatee without acquiring a vested interest; he is said to be substituted if it is meant that he should succeed on the death of the prior legatee, notwithstanding that the right has vested in the latter. A substitute takes not as a disponee, but as an heir. In moveable and mixed estate the presumption is in favour of conditional institution; in heritable, on the other hand, the presumption is that a substitution was intended.[3] There may, however, be a conditional institution in the case of heritage [4] and a substitution in the case of moveable estate;[5] but very explicit language is required if a destination in regard to moveable property is to be construed as a substitution, and it has been said that a destination will not be so construed unless it is impossible to treat it as a conditional institution.[6] A substitution in moveables will be evacuated if the legatee obtains possession of the subject,[7] or if he disposes of it by deed or testament.[8] In the case of a bequest to A. or his heirs, the heirs are conditional institutes, and will take in the event of A. predeceasing the testator.[9] In certain cases, however, a different construction has been put on such a destination, and it has been held that no conditional institution of the heirs is created.[10] The Crown as *ultimus hæres* is not included in a destination to heirs.[11]

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[1] *Inglis* v. *MacNeils*, 1892, 19 R. 924; *Campbell's Trs.* v. *Dick*, 1915 S.C. 100; cf. *Binnie's Trs.* v. *Prendergast*, 1911 S.C. (H.L.) 6.

[2] See Lord Dundas's opinion in *Cobban's Exrs.* v. *Cobban*, 1915 S.C. 82, and cases there cited.

[3] *Greigs* v. *Johnston*, 1833, 6 W. & S. 406; *Watson* v. *Giffen*, 1884, 11 R. 444; *Paul* v. *Horne*, 1872, 10 M. 937; *M'Lay* v. *Chalmers*, 1903, 11 S.L.T. 223; *Henderson* v. *Hamilton*, 1858, 20 D. 473.

[4] *Marshall* v. *Marshall*, 1900, 2 F. 1023.

[5] *Maclean's Trs.* v. *Maclean*, 1889, 16 R. 1095; *Bell's Exrs.* v. *Borthwick*, 1897, 24 R. 1120; *M'Clymont's Exrs.* v. *Osborne*, 1895, 22 R. 411.

[6] *Greigs* v. *Johnston*, *supra*; see also *Crumpton's Judicial Factor* v. *Barnardo's Homes*, 1917 S.C. 713, per Lord Pres. Strathclyde.

[7] *Buchanan's Trs.* v. *Dalziel's Trs.*, 1868, 6 M. 536; *Robertson* v. *Hay-Boyd*, 1928 S.C. (H.L.) 8, per Viscount Dunedin at p. 13; *Bell's Exrs.* v. *Borthwick*, *supra*, per Lord Moncrieff.

[8] *Fyffe* v. *Fyffe*, 1841, 3 D. 1205; *Dyer* v. *Carruthers*, 1874, 1 R. 943.

[9] *Halliburton*, 1884, 11 R. 979; *Cleland* v. *Allan*, 1891, 18 R. 377; *Bowman* v. *Bowman*, 1899, 1 F. (H.L.) 69; *Macleod* v. *Wilson*, 1903, 6 F. 213.

[10] *Findlay* v. *Mackenzie*, 1875, 2 R. 909; *Baillie's Exrs.* v. *Baillie*, 1899, 1 F. 974; *Ferguson*, 1906, 13 S.L.T. 724; see also *Donald's Trs.* v. *Donald*, 1864, 2 M. 922.

[11] *Torrie* v. *Munsie*, 1832, 10 S. 597.

SECTION 10.—JOINT AND SEVERAL LEGACIES.

SUBSECTION (1).—*Survivorship and Accretion.*

278. A legacy may be left to two or more persons jointly, or severally, or successively. A legacy bequeathed simply to *A.* and *B.*, *i.e.* without any expressions denoting severance into shares to *A.* and *B.* (whether of capital or of income) goes to them equally if both survive the period of vesting; if one of them predecease, the other takes the whole.[1] A legacy to persons "jointly and severally" receives the same interpretation. If words importing severance are used, as *e.g.* if the legacy is to two persons "equally," or "to be equally divided," between them or "share and share alike," there is no *jus accrescendi*, and the survivor is entitled to his own original share only and does not take the other share. "There is a rule of construction, settled by a series of decisions beginning in the last century and coming down to the case of *Buchanan's Trs.* in 1883,[2] to the effect that where a legacy is given to a plurality of persons named or sufficiently described for identification equally among them, or in equal shares, or share and share alike, or in any other language of the same import, each is entitled to his own share and no more, and there is no room for accretion in the event of the predecease of one or more of the legatees. The rule is applicable whether the gift is in liferent or in fee to the whole equally, and whether the subject of the bequest be residue, or a sum of fixed amount, or corporeal moveables. The application of this rule may of course be controlled or avoided by the use of other expressions by the testator importing an intention that there shall be accretion in the event of the predecease of one or more of the legatees," as by a gift to survivors.[3] The rule does not apply to legacies left to a class of unascertained number although the words "equally among them," or "share and share alike" are used.[4] In this case the right vests in the members of the class as a whole who survive the period of vesting.

279. Where a bequest is made to a number of legatees and one of these dies leaving issue, who are entitled under the *conditio si sine liberis* to their parent's share, such issue will not participate in the share of any of the other legatees who may die without issue;[5] and in the case of a gift to a number of persons and the survivors, an express provision that the issue of predeceasers are to take their parents' share will (in the absence of a clear provision to the contrary) entitle such issue only to their parents' original share and not to any accrescing share.[1] "A child who is called either expressly or under the implied condition *si sine liberis*, etc., to take a parent's share is entitled only to the parent's original share, and not to any participation in a lapsed or accrued share."[2]

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[1] Stair, iii. 8, 27; Bell's Prin., s. 1882; *Andrew's Exrs.* v. *Andrew's Trs.*, 1925 S.C. 844; *Napier's Trs.* v. *Napier*, 1908 S.C. 1160; *Wright's Exrs.* v. *Robertson*, 1855, 27 Sc. Jur. 341.

[2] 1883, 20 S.L.R. 666.

[3] *Paxton's Trs.* v. *Cowie*, 1886, 13 R. 1197; *Cochrane's Trs.* v. *Cochrane*, 1914 S.C. 403; *Young's Trs.* v. *Young*, 1927 S.C. (H.L.) 6; *M'Laren* v. *M'Alpine*, 1907 S.C. 1192; *M'Gregor's Trs.* v. *M'Gregor*, 1909 S.C. 362.

[4] *Muir's Trs.* v. *Muir*, 1889, 16 R. 954; *Menzies' Factor* v. *Menzies*, 1898, 1 F. 128; *Robert's Trs.* v. *Roberts*, 1903, 5 F. 541; *Young's Trs.* v. *Young*, *supra*.

[5] See CONDITIO SI SINE LIBERIS, Vol. IV. p. 330, *ante*. A recent case to this effect is *Crosbie's Trs.* v. *Crosbie*, 1927 S.C. 159.

Subsection (2).—*Construction of the Words "Survivors" or "Surviving."*

280. An exception to the general rule that words are to be read in their strict and literal meaning is to be found in certain rather special cases turning on the construction of these terms. In *Ramsay's Trs.* v. *Ramsay*[3] the testator directed his trustees to make over his estate to his five brothers and sisters in liferent and their issue in fee, "whom failing to the issue of the survivor or survivors in fee." The longest liver of the liferenters having died without issue, the Court, in order to avoid intestacy in regard to the share liferented by him, construed the word "survivors" as meaning "others," so that it passed to the issue of his brothers and sister. A similar construction was put on the words in *Paterson's Trs.* v. *Brand*[4] by reason of a destination-over, under which, failing all the legatees, the legacy was to fall into residue. The authorities on this matter are reviewed by Lord President Clyde in *Curle's Trs.* v. *Millar*[5] in an opinion which somewhat impairs the authority of these two cases. The actual decision in this last case was, however, reversed on appeal.[6] Under the general scheme of the deed under consideration in that case trustees were directed to hold the estate for the testator's three children in liferent and for their issue in fee, and, if any child died without leaving issue, they were further directed to hold the capital of that share for the survivors or the survivor, if only one, in the way already provided with regard to their original shares. A daughter died leaving issue, thereafter the son died childless, and the surviving daughter had issue. Proceeding on the terms of the deed, the House of Lords adopted a construction sanctioned by certain English decisions to the effect that "surviving" meant, not "other," but surviving either in person or in stirps; the result being that the share liferented by the son passed to the issue of both of his sisters.

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[1] *M'Nish* v. *Donald's Trs.*, 1879, 7 R. 96; *Cumming's Trs.* v. *White*, 1893, 20 R. 454; *Macfarlane's Trs.* v. *Macfarlane*, 1906, 8 F. 787; *Young* v. *Robertson*, 1862, 4 Macq. 337. Contrast *Laing* v. *Barclay*, 1865, 3 M. 1143; *M'Culloch's Trs.*, 1892, 19 R. 777; *Neville* v. *Shepherd*, 1895, 23 R. 351, and *M'Meekan's Trs.* v. *M'Clelland*, 1918, 56 S.L.R. 280, in which children were found entitled to participate in accrescing shares.

[2] Per Lord Trayner in *White's Trs.* v. *Chrystal*, 1893, 20 R. 460.

[3] 1876, 4 R. 243.

[4] 1893, 21 R. 253.

[5] 1920 S.C. 607. See also *Ward* v. *Lang*, 1893, 20 R. 949.

[6] 1922 S.C. (H.L.) 15.

SECTION 11.—REVOCATION AND ADEMPTION.

SUBSECTION (1).—*Revocation.*

281. Legacies are ambulatory and may be revoked at any time by the testator, and that either expressly or by implication. A legacy will fall if the deed in which it is given is revoked. When a later deed does not expressly revoke an earlier, it will do so in so far, and in so far only, as its provisions are inconsistent with those of the earlier deed.[1] If possible the deeds will be read as forming one consistent deed. Assuming that the deed containing a legacy remains in force, if a question arises whether the legacy has been revoked, the general rule is that the onus rests on those who assert that it has been revoked; and it will not be held to be revoked by a subsequent writing unless that writing either contains words of revocation or affords a clear indication that it was not the testator's intention that the legacy should remain in force. The Court will not infer revocation from doubtful or equivocal expressions.[2] But the circumstance that a certain fact narrated as the reason for the revocation of a legacy turns out to be false has been held not to prevent the revocation taking place.[3] Further, where a bequest has been made to an institute, and conditional institute, a subsequent revocation of the bequest to the institute will not by implication operate as a revocation of the gift to the conditional institute. "A bequest to A., and if A. shall predecease a certain event to B., is not, I apprehend, revoked by a revocation of the gift to A. At least it is not so, unless the intention is otherwise clear." [4]

282. With regard to a gift of the same thing to different persons, the rule laid down by Stair is: "If one thing or sum be specially legated to one person, and by a posterior writ be legated to another, the posterior legacy takes place, and is a revocation of the former; and they do not come in together *concursu partes facere*; as they would do if left in one writ by the Roman law, and each legator would have but a half; but we have no such custom or style to legate the same thing entirely to different persons in the same writ." [5]

SUBSECTION (2).—*Ademption.*

283. A special legacy is said to be adeemed if the subject legated has ceased to exist as part of the testator's estate at the date of his death. This does not depend upon the testator's intention, the sole and determining question being whether the subject was or was not

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[1] *Gordon's Exr.* v. *Macqueen*, 1907 S.C. 373; *Dick's Trs.* v. *Dick*, 1907 S.C. 953; *Stoddart* v. *Grant*, 1852, 1 Macq. 163; *Kirkpatrick's Trs.* v. *Kirkpatrick*, 1874, 1 R. (H.L.) 37.

[2] *Stoddart* v. *Grant*, *supra*; *Scott* v. *Sceales*, 1865, 3 M. 1130; *Gordon's Exr.* v. *Macqueen*, 1907 S.C. 373; *Mitchell's Administratrix* v. *Edinburgh Royal Infirmary*, 1928 S.C. 47; *Ogilvie's Trs.*, 1870, 8 M. 427.

[3] *Grant* v. *Grant*, 1846, 8 D. 1077; Ersk. iii. 9, 8.

[4] *Stuart's Trs.* v. *Stuart*, 1899, 1 F. 699, per Lord Kyllachy; see also *Macfarlane*, 1885, 12 R. 936; *Davidson* v. *Christie*, 1893, 3 S.L.T. 126.

[5] Stair, iii. 8, 42; *Hamilton*, 1736, Mor. 8064.

in bonis of the testator at his death.[1] Thus if a bond [2] or a bill [3] or a debt [4] bequeathed be repaid during the testator's lifetime, the bequest is not exigible. So also in the case of a bequest of heritage, if the subjects have ceased to belong to the testator, whether under a voluntary or a compulsory transaction, the legacy is adeemed; [5] but this is not so if the sale is subject to a suspensive condition and the title to the heritage remains in the testator,[6] or if the testator dies before granting a disposition in favour of the purchaser.[7] In regard to a bequest of shares or stock in a company, while there will be ademption if the "identity and character" of the investment are altered between the date of the will and the testator's death,[8] it is otherwise if the alteration is nominal and formal, the substance of the investment being unchanged, as *e.g.* a change of denomination.[9]

SECTION 12.—PAYMENT OF LEGACIES.

SUBSECTION (1).—*Principal Sum.*

284. As has already been pointed out, legacies are always postponed to the payment of the testator's debts (whether these are secured or unsecured), including the legal claims of spouses and children. Accordingly, executors or trustees are bound before paying legacies to meet the claims made by creditors on the estate; and trustees and executors, who paid away the moveable estate in the knowledge that there were debts secured on the heritage, but under the erroneous belief that the security was sufficient to meet these debts, were held personally liable to make good to the creditors the deficiency of the security.[10]

285. Trustees cannot be compelled to pay debts or legacies prior to the expiry of six months from the testator's death; [11] after the lapse of that period they may pay *primo venienti*.[12] They may then, after due inquiry, and on being satisfied on reasonable grounds that all debts have been met or provided for, pay the legatees. If the estate is insolvent when the legacy is paid, or if the executor has paid over the legacy without meeting or providing for the debts due from the estate, the legatee may be required by an unpaid creditor to refund what he has received. But creditors are bound to make their claims in reasonable time; and, if there was originally a sufficient fund in the executor's hand for satisfying both creditor and legatee, then, although the fund should subsequently prove insufficient to meet the debt, the legatee cannot be required to refund what he has received at the instance of a creditor who has neglected to claim or has so acted as to induce the belief that he has abandoned or discharged his debt.[1] The protection afforded to the legatee in such cases is supported on the grounds that the creditor's conduct has in some measure been responsible for the legacy having been paid without satisfaction of his debt, and that it would be inequitable that the legatees should be called on "to make good the debts out of the money they had thus *bona fide* received and perhaps consumed." [2] A claim against the legatee, however, cannot be entertained until the testator's legal representative has been sued and found to have insufficient funds; [3] and the legatees are not jointly and severally liable, but each only for his own proportion.[4] In a case in which the testator's next-of-kin successfully impugned a bequest as void on the ground of uncertainty, they were held entitled to insist in an action of repetition against the beneficiaries who had received payment under the bequest, the trustees, who had refused to sue for repetition, being called as defenders.[5]

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[1] *M'Arthur's Exrs.* v. *Guild*, 1908 S.C. 743; *Macfarlane's Trs.* v. *Macfarlane*, 1910 S.C. 325.

[2] *Pagan* v. *Pagan*, 1838, 16 S. 383.

[3] *Jack* v. *Lauder*, 1742, Mor. 11,357.

[4] *Maclean* v. *Maclean's Exr.*, 1908 S.C. 838; *Davidson's Trs.* v. *Davidson*, 1901, 4 F. 107; *Cobban's Exrs.* v. *Cobban*, 1915 S.C. 82.

[5] *Chalmers* v. *Chalmers*, 1851, 14 D. 57; see also *Paul* v. *Paul's Trs.*, 1821, 1 S. 104; *Congreve's Trs.* v. *Congreve*, 1874, 1 R. 1102.

[6] *M'Arthur's Exrs.* v. *Guild*, *supra*.

[7] *Pollok's Trs.* v. *Anderson*, 1877, 4 F. 455.

[8] See *Anderson's Trs.* v. *Thomson*, 1877, 4 R. 1101; *In re Slater*, [1907] 1 Ch. 665.

[9] *Macfarlane's Trs.* v. *Macfarlane*, *supra*; *Mitchell's Trs.* v. *Fergus*, 1889, 16 R. 902; *In re Clifford*, [1912] 1 Ch. 29; see also *Barr's Trs.* v. *Ardrossan Castle Curling Club*, 1901, 3 F. 903; Theobald on Wills, 8th ed., 177.

[10] *Lamond's Trs.* v. *Croom*, 1871, 9 M. 662; *Heritable Securities Investment Association* v. *Miller's Trs.*, 1892, 20 R. 675.

[11] See EXECUTOR, Vol. VI. p. 498, *ante*, paras. 1139–42; M'Laren on Wills, ii. 1161.

[12] *Stewart's Trs.* v. *Evans*, 1871, 9 M. 810, per Lord Justice-Clerk Moncreiff at p. 813; *Beith* v. *Mackenzie*, 1875, 3 R. 185; *Taylor & Ferguson* v. *Glass's Trs.*, 1912 S.C. 165.

286. Legatees having right to specific sums are not bound to grant a formal discharge upon obtaining payment, or to pay *ad valorem* fees to the agent of the party making the payment. Except in the case of a residuary legatee, a simple receipt is all that can be required.[6] Nor can trustees require as a condition of paying a legacy that the legatee shall discharge a separate and distinct claim which he may have against the trust estate.[7]

SUBSECTION (2).—*Interest.*

287. Apart from special instruction in the will there is no absolute rule as to the rate of interest to be awarded in respect of an unpaid legacy. The question what rate shall be allowed is one of circumstances, and an important circumstance is the rate earned or which could reasonably have been earned on the trust estate.[8] The modern rule is "that legacies bear interest like any other money debt from the date when they are due and payable." [9] If the testator does not specify any particular term of payment, interest is due from the time of the testator's death,[1] whereas if payment is postponed to a later date, interest will run only from that date.[2] "Interest on a legacy can never be allowed contrary to the directions of the testator, express or implied. I admit the rule that where a legacy is conceived in general terms interest is due from the testator's death. But that rule must yield to any provision of his which is inconsistent with it. Thus, if he burdens a legacy with a liferent, interest is due only from the expiry of the liferent, or if he fixes a time for payment of the legacy, interest is due, at least in the case of strangers, only from the date which he thus fixes. The principle underlying all rules for payment of interest on legacies is that the capital is, or ought to be, in the hands of the executor or trustees as an interest-bearing subject. The clearest case for exacting interest arises where there is *morata solutio.* Even where that cannot be said—and of course it can never be said in the interval between death and the realisation of the estate—there must always be the fundamental fact that the money or its equivalent, forming the capital of the legacy, is extant and yielding income to the executor in one form or another except in so far as the yielding of income may be temporarily suspended by the process of realisation."[3] Hence when legacies payable under the testator's directions in 1890 were not paid till 1919 no interest was allowed to the legatees as owing to the insolvency of the estate there were no assets bearing interest or out of which the legacies could have been paid.[4]

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[1] Ersk. iii. 9, 46; *Robertson* v. *Strachans*, 1760, Mor. 8087; *Wyllie* v. *Black's Tr.*, 1853, 16 D. 180; *Thriepland* v. *Campbell*, 1855, 17 D. 487; *Mags. of St. Andrews* v. *Forbes*, 1893, 31 S.L.R. 225.

[2] *Robertson* v. *Strachans, supra*; *Wyllie* v. *Black's Tr., supra*, per Lord Justice-Clerk Hope.

[3] *Wyllie* v. *Black's Tr., supra*, per Lord Justice-Clerk Hope, at p. 188.

[4] *Wyllie* v. *Black's Tr., supra*; *Poole* v. *Anderson*, 1834, 12 S. 481.

[5] *Armour* v. *Glasgow Royal Infirmary*, 1909 S.C. 916.

[6] *Fleming* v. *Brown*, 1861, 23 D. 443; see also *M'Laren* v. *Howie*, 1869, 8 M. 106.

[7] *Laing* v. *Laing*, 1895, 22 R. 575.

[8] *Waddell's Trs.* v. *Crawford*, 1926 S.C. 654, in which the earlier authorities are reviewed.

[9] *May's Trs.* v. *Paul*, 1900, 2 F. 657, per Lord Trayner; *Waddell's Trs.* v. *Crawford, supra*.

288. Where trustees are directed to set apart a sum and pay it at a future date to the legatee, the interest accruing on the sum may fall to be paid to the legatee along with the capital,[5] but if the trustees are directed merely to pay a certain sum to a legatee at a future date, interest is not included.[6] A bequest of residue, although deferred or contingent, will carry the intermediate interest accruing on it.[7]

SUBSECTION (3).—*Legacies Free of Duty.*

289. It is not unusual for testators to leave legacies free of legacy duty. This is equivalent to a bequest of an additional sum wherewith to pay the tax, and, if the estate is insufficient to pay all the legacies, the legacy-duty is added to the legacy in ascertaining the amount for the purpose of abatement.[1]

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[1] *May's Trs.* v. *Paul,* 1900, 2 F. 657; *Kirkpatrick* v. *Bedford,* 1878, 6 R. (H.L.) 4; *Waddell's Trs.* v. *Crawford,* 1926 S.C. 654.

[2] *Playfair's Trs.* v. *Playfair,* 1890, 17 R. 1241; cf. *Ross* v. *Ross,* 1896, 23 R. 802; *M'Lean's Trs.* v. *M'Lean,* 1892, 18 R. 892.

[3] *Ewing* v. *Mathieson,* 1904, 41 S.L.R. 594, per Lord Stormonth Darling.

[4] *Waddell's Trs.* v. *Crawford, supra.*

[5] *Glasgow's Trs.* v. *Glasgow,* 1830, 9 S. 87; *Macalister's Trs.* v. *Macalister,* 1836, 15 S. 170; see also *Campbell* v. *Reid,* 1840, 2 D. 1084.

[6] *Playfair's Trs.* v. *Playfair,* 1890, 17 R. 1241; *Brodie* v. *Brodie's Trs.,* 1893, 20 R. 795.

[7] *Pursell* v. *Elder,* 1865, 3 M. (H.L.) 59; *Sturgis* v. *Meiklam's Trs.,* 1865, 3 M. (H.L.) 70; *Turnbull* v. *Cowan,* 1848, 6 Bell's App. 222; *Cuming* v. *Boswell,* 1853, 19 D. (H.L.) 7; 28 Scot. Jur. 646; *Campbell* v. *Reid, supra*; *Fergusson* v. *Smith,* 1867, 6 M. 83; *Wilson's Trs.* v. *Wilson,* 1901, 3 F. 967.

SECTION 13.—CONDITIONS IN LEGACIES.

290. Conditions may be either expressed or implied. Instances of implied conditions are afforded by the *Conditio si sine liberis*.[2] A legacy also which in form is unconditional is sometimes regarded as really conditional: thus, if a legacy depends on the happening of some event which is uncertain in the sense that it may or may not happen, the legacy is treated as conditional in accordance with the brocard *Dies incertus pro conditione habetur*.[3]

291. Express conditions are susceptible of classification under various heads. Thus, according to its effect on the legatee's right, a condition may be suspensive (precedent) or resolutive (subsequent). The former suspends vesting in the legatee, as *e.g.* in the case of a bequest to a person on condition that he attains a certain age or survives a given time: the latter does not prevent the legatee acquiring right to the legacy *pendente conditione*, but has the effect, if it come into operation, of depriving the legatee of his right, as *e.g.* in the case of a bequest to a person which he is to lose if he succeed to an estate,[4] or if he enters into a second marriage,[5] or if he becomes bankrupt, or if he sells the estate bequeathed.[6] The difference in the operation of these two kinds of conditions is most fully illustrated in the rules as to the vesting of legacies. Differing apparently from the law of England, Scots law does not exact any higher degree of precision in the expression of a resolutive condition than is required in one which is suspensive.[7]

292. Another classification is that which divides conditions into casual and potestative conditions. The former "depend upon the casual event of that which cannot naturally be foreknown" "upon accident without his power," whereas a potestative condition is one "depending upon the power of the legatar." [8] As regards potestative conditions, it has been laid down that "it is essential to look to the relation of the condition to the subject of the gift, and the effect which it was intended by the testator to operate. Such conditions need not always be performed in terms, or specifically. In some cases equivalents may be sufficient fulfilment. In others fulfilment of part may suffice instead of complete fulfilment, and, in others again, the condition need not be performed at all. These results all depend on the substance of the condition more than on the mere words in which it may be expressed." In the case [1] in which the law was thus laid down the Court found that a legacy bequeathed on a potestative condition was due where fulfilment was rendered impossible by the voluntary act of the party in whose favour the condition was conceived. So also where a legacy was left on condition that the legatee should return within a certain time to claim it, with a gift-over to others in the event of his failure to return, it was held that the legacy was not forfeited if the legatee had not notice of the legacy and its terms.[2]

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[1] *Lord Advocate* v. *Miller's Trs.*, 1884, 11 R. 1046 at 1052; *In re Turnbull*, [1905] 1 Ch. 726.

[2] See Vol. IV. p. 330, *ante*.

[3] See VESTING IN SUCCESSION.

[4] *Earl of Caithness* v. *Sinclair*, 1912 S.C. 79.

[5] *Kidd* v. *Kidd's Trs.*, 1863, 2 M. 227; *Smith's Trs.* v. *Smith*, 1883, 10 R. 1144; *Leith* v. *Blaikie*, 1853, 2 Stuart 197.

[6] *Chaplin's Trs.* v. *Hoile*, 1890, 18 R. 27; 19 R. 237; *Falconar Stewart* v. *Wilkie*, 1892, 19 R. 630.

[7] *Wemyss* v. *Wemyss' Trs.*, 1921 S.C. 30.

[8] Stair, i. 3, 8; iii. 8, 22.

293. A condition which is physically impossible or illegal or *contra bonos mores* is held to be *pro non scripto*.[3] Thus a condition requiring the separation of spouses [4] or that a child of tender years should not reside with his mother [5] would for this reason be ineffectual. Total prohibitions of marriage are illegal and to be disregarded.[6] But it would seem that a prohibition against marrying a particular person, or one out of a class of persons, is lawful and enforceable.[7] Conditions that a legatee shall not marry in minority without certain consents are apparently good.[8] Trustees cannot refuse their consent except upon reasonable ground; it is sufficient that they do not object, and their consent given after the event will suffice.[9] The condition that a surviving spouse shall forfeit the whole or part of his or her provision on re-marriage is valid,[10] and a limitation of a provision to the period while the grantee is unmarried is also valid.[11]

294. When a bequest is made to a legatee of a sum to be used for a certain purpose which cannot be carried out, this purpose may be so wrought into the substance of the bequest that the consequence is that the legacy fails.[12] In *Dunbar* v. *Scott's Trs.*,[13] however, a legacy left to a person for the purpose of purchasing a commission in the army was held not to have failed although the purpose could not be carried out owing to the abolition of the purchase of commissions. A legacy bequeathed in implement of an agreement to enter into, or continue, illicit cohabitation, or tending to induce immoral conduct, is reducible as being *contra bonos mores*.[1]

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[1] *Pirie* v. *Pirie*, 1873, 11 M. 941; see also *Reids* v. *M'Phedran*, 1881, 9 R. 80.

[2] *Rodger's Trs.* v. *Allfrey*, 1910 S.C. 1015.

[3] Stair, i. 3, 7; Ersk. iii. 3, 85; Bell's Prin., s. 1785.

[4] See *Barker* v. *Watson's Trs.*, 1919 S.C. 109.

[5] *Fraser* v. *Rose*, 1849, 11 D. 1466; *Grant's Trs.* v. *Grant*, 1898, 25 R. 929; contrast *Reid* v. *Coates*, 5th March 1813, F.C.; see *Wemyss* v. *Wemyss's Trs.*, 1921 S.C. 30.

[6] Ersk. iii. 3, 85; Fraser on Husband and Wife, 3rd ed., i. 464 *et seq*; M'Laren on Wills, i. 601. The law stands upon decisions of older date which are not altogether consistent and which on certain points leave the law somewhat uncertain. These cases are reviewed in Lord Fraser's work (*loc. cit.*).

[7] *Forbes* v. *Forbes' Trs.*, 1882, 9 R. 675; *Ommanney* v. *Bingham*, 1796, Mor. 2985; 3 Pat. 448; cf. *Graham* v. *Graham*, 1823, 1 Sh. App. 365.

[8] *Buchannan* v. *Buchannan*, 1680, Mor. 2968; *Fetterneer* v. *Lord Semple*, 1680, Mor. 2969.

[9] *M'Kenzie* v. *Creditor's of Kinminnoty*, 1750, Mor. 2977; *Buntin* v. *Buchanan*, 1710, Mor. 2972; *Pringle & Rutherford* v. *Pringle*, 1688, Mor. 2972; *Wellwood's Trs.* v. *Boswell*, 1851, 13 D. 1211.

[10] *Kidd* v. *Kidd*, 1863, 2 M. 227; *Sturrock* v. *Rankin's Trs.*, 1875, 2 R. 850; *Fowlis* v. *Gilmours*, 1672, Mor. 2965.

[11] *Kidd* v. *Kidd* and *Sturrock* v. *Rankin's Trs.*, *supra*; *Smith's Trs.* v. *Smith*, 1883, 10 R. 1144; *Bartholomew's Trs.* v. *Bartholomew*, 1904, 6 F. 322.

[12] *Dunbar* v. *Scott's Trs.*, 1872, 10 M. 982, per Lord Cowan.

[13] *Supra*; see *Aitken's Tr.* v. *Aitken*, 1927 S.C. 374.

SECTION 14.—CUMULATIVE AND SUBSTITUTIONARY LEGACIES.

295. Where two or more bequests are made to the same individual either in the same writing or in several deeds, the question arises, in the absence of an express declaration of the testator's intention, whether the legatee is entitled to all the bequests, or whether some are given in substitution of other bequests. Obviously if the same article, *e.g.* a particular horse or a certain watch, is bequeathed to a person in two deeds, there can be no question but that the subject is given only once; but if, on the other hand, £100 be given to A. in a will, and £100 to him in a codicil, it is apparent that the bequest is capable of being construed either as a gift of £100 or as a gift of £200.[2] In the case of two deeds such a question will arise only if both are subsisting and effectual; for if the later deed revokes the earlier one, the bequests made in the latter disappear.

296. The general rule both in English and in Scots law is well settled, and was stated by Lord President Inglis in *Royal Infirmary of Edinburgh* v. *Muir's Trs.*:[3] "When exactly the same amount is given twice in the same paper, the presumption is that it is a mere repetition arising from some mistake or forgetfulness; but where the same amount is bequeathed in two distinct testamentary papers, both equally formal," *i.e.* equally valid,[4] "then both legacies are payable, unless it can be shewn from the settlement of the deceased, or by other competent evidence, that his intention was to give one legacy only."[5] The presumption will not be displaced on "mere speculative conjecture or plausible doubt."[6] Extrinsic evidence of the testator's intention is generally inadmissible;[6] and although the Court may consider the pecuniary circumstances of the testator at the time when the deeds were written, indications of his intention appearing in jottings or memoranda cannot be regarded.[7]

297. Where some of the legacies are described as additional, while others are not so described, an inference thereby arises that the latter are substitutional.[8] If there is any material difference between the two legacies, this will strengthen the presumption that they are cumulative; as, *e.g.* if they differ in amount, or in the date of payment, or in the conditions attached to them;[1] or if the sum given is charged on different persons or funds;[2] or if the one legacy be given in liferent and the other in fee;[3] or if the one be an annuity and the other a sum of money;[4] or if in the second legacy a motive for the gift is assigned which is not stated in regard to the first.[5] In short, whatever tends to distinguish the one legacy from the other is favourable to the legatee's claim to both. "It is always an element in favour of a double bequest that there are distinctive characters in the two bequests. But it is not always a conclusive fact that there is some distinction."[6]

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[1] *Johnstone* v. *McKenzie's Exrs.*, 1835, 14 S. 106; *Young* v. *Johnson & Wright*, 1880, 7 R. 760; *Troussier* v. *Matthew*, 1922, S.L.T. 670. As to bonds, see *Hamilton* v. *Hamilton*, 1765, Mor. 9471; *Durham* v. *Blackwood*, 1622, Mor. 9469.

[2] *Horsburgh* v. *Horsburgh*, 1847, 9 D. 329 at 381.

[3] 1881, 9 R. 352.

[4] *Fraser* v. *Forbes's Trs.*, 1899, 1 F. 513.

[5] *Horsburgh* v. *Horsburgh*, *supra*; *Elliot* v. *Stair's Trs.*, 1823, 2 S. 250; *Stirling* v. *Watson*, 1704, Mor. 11442.

[6] *Arres' Trs.* v. *Mather*, 1881, 9 R. 107, per Lord Young.

[7] *Trs. of Free Church* v. *Maitland*, 1887, 14 R. 333, but cf. *Livingston* v. *Livingston*, 1864, 3 M. 20.

[8] *Trs. of Free Church* v. *Maitland*, *supra*, per Lord Shand *Henderson* v. *Burt*, 1858, 20 D. 402.

298. It is said by Lord M'Laren[7] that substitution may legitimately be inferred—

1. Where the second instrument expressly refers to the first in such terms as to indicate an intention to revise it.
2. Where it is plain that both deeds are not meant to be operative, as, *e.g.* where both deeds are general settlements.[8]
3. Where the instruments are identical, or nearly identical, in their terms, the absence of any material variance between the two provisions is an argument that the second provision is merely a repetition of the first.
4. Where the form of the disposition is altered to meet the altered circumstances of the legatee, or to constitute a liferent or benefit of some kind in favour of another legatee.[9]
5. Where the second provision is demonstrative, *i.e.* where it only points out a fund from which the original provision shall be paid or made good.[10]

There is no presumption against a residuary legatee getting also a quantitative legacy, whether in his own name or as one of a class.[11]

SECTION 15.—SATISFACTION—DEBITOR NON PRÆSUMITUR DONARE.

299. There is in the law of Scotland no presumption (such as there is in English law) against double portions; and if a father gives his child the same amount of money by two different deeds, unless it appear either expressly or by necessary implication that he intended the one sum to be in satisfaction of the other, the law will not presume that he did so intend.[1] The only case in which any presumption can be said to operate is where the first provision is *in obligatione*, when the maxim *debitor non præsumitur donare* comes into play. In such cases it rests on the legatee, who maintains that the legacy is given in addition to the obligatory provision, to show that the testator so intended; [2] but the "maxim will only prevail in cases where, according to the opinion of the Court upon the terms of the documents, the construction of the will favours the substitution of a new and substantially similar provision for the onerous provisions which had been previously made." [3]

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[1] *Elliot* v. *Stair's Trs.*, 1823, 2 S. 250; *M'Gowan* v. *Anstruther's Trs.*, 1827, 5 S. 297.

[2] *Frew* v. *Frew*, 1828, 6 S. 554.

[3] *Sutherland* v. *Sutherland's Exrs.*, 1825, 4 S. 220; *M'Intyre* v. *M'Farlane's Trs.*, 1 March 1821, F.C.; *Straton's Trs.* v. *Cunningham*, 1840, 2 D. 820; *Dewar* v. *Scott*, 1880, 8 R. 83.

[4] *Bryce's Trs.*, 1878, 5 R. 722.

[5] *Horsburgh* v. *Horsburgh*, 1847, 9 D. at p. 379.

[6] *Livingston* v. *Livingston*, 1864, 3 M. 20, per Lord Pres. M'Neill.

[7] Wills, i. 730. These points have been relied on in the English cases; see Theobald on Wills (8th ed.), pp. 170–2.

[8] *Miller's Trs.* v. *Kirkaldy*, 1905, 13 S.L.T. 73.

[9] *Trs. of Free Church* v. *Maitland*, 1887, 14 R. 333.

[10] *Chivas' Trs.* v. *Chivas*, 1893, 21 R. 1.

[11] *Kirkpatrick* v. *Bedford*, 1878, 6 R. (H.L.) 4.

300. There are numerous cases on the question whether a child who receives a legacy under his parent's settlement is entitled also to a provision made for him in the parent's marriage contract or settled on him in his own marriage contract by his parent.[4] In each case the question falls to be determined on a consideration of the terms of the particular deeds, and extrinsic evidence as to the testator's intention is not admissible; [5] but it may be said that (as in the case when the question is whether legacies are cumulative or substitutionary) a material difference in the terms in which the legacy and the provision are given supports the view that the child is entitled to both.[6] It has also been said that it is improbable that a gift of an uncertain share of residue made to a child in his parent's general settlement should be intended to interfere in any way with special provisions to the child made in a marriage contract.[7]

301. The maxim *debitor non præsumitur donare* applies also where the testator has contracted an ordinary debt to a legatee, that is to say, the legacy is in the ordinary case to be regarded as in satisfaction of the debt.[8] The question is one of intention, but "when nothing can lead the Court to decide whether a debtor, leaving at his death instructions to pay a sum of money to a creditor, meant this as a payment of debt, or to be a payment over and above, the presumption as a reasonable one is to apply in favour of the executor, so that he will not be called upon to pay both." [9]

302. Where a father, who has executed a will or marriage contract containing a provision in favour of a child, makes payment of sums to that child, there is no presumption that these payments are to be imputed towards satisfaction of the provision.[1] It is entirely a question of intention, and in order to ascertain the father's intention, the Court (although it will not regard parole evidence as to statements made by the father) will consider the terms of the will or marriage contract and also of any other document by the father bearing on the matter,[2] as well as correspondence between the parties.[3] In *Hutchison* v. *Skelton*,[4] it was held that payment of a sum of £1000 to a daughter was to be considered as in partial satisfaction of a sum subsequently settled by the father on her in liferent and her issue in fee with a declaration that all sums paid or to be paid should be accounted towards the provision. In order to avoid difficulty and to set forth his intention, the father may declare in his will that all advances by him are to be imputed towards the bequests in the will in favour of the recipient; and in such clauses the word "advances" is not to be construed in any limited sense as meaning only sums which the recipient is under legal obligation to repay.[5]

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[1] *Kippen* v. *Darley*, 1858, 3 Macq. 203.

[2] *Campbell's Trs.* v. *Adamson*, 1911 S.C. 1111.

[3] *Johnstone* v. *Haviland*, 1896, 23 R. (H.L.) 6, per Lord Watson; *Kippen* v. *Kippen's Tr.*, 1874, 1 R. 1171; *Buttery's Trs.* v. *M'Clelland*, 1879, 6 R. 564.

[4] *Rennie* v. *Rennie*, 1831, 9 S. 714; *Grant* v. *Anderson*, 1840, 3 D. 89; *Smith* v. *Common Agent in Ranking and Sale of Auchenblane*, 1841, 3 D. 1109; *Keith Johnston's Trs.* v. *Johnston's Trs.*, 1894, 22 R. 28; *Wedderburn* v. *Dundas*, 1827, 5 S. 790; *Hay* v. *Hay's Trs.*, 1823, 2 S. 313; *Somervell* v. *Somervell*, 1884, 11 R. 1004.

[5] *Johnstone* v. *Haviland* and *Campbell's Trs.* v. *Adamson*, *supra*.

[6] *Keith Johnston's Trs.* v. *Johnston's Trs.*, *supra*; *Kippen* v. *Darley*, *supra*, per Lord Chelmsford L.C.; *Campbell's Trs.* v. *Adamson*, *supra*; *Cowan* v. *Dick's Trs.*, 1873, 11 M. 735; *Macdowall* v. *Gordon*, 1833, 11 S. 952; *Hunter* v. *Nicholson*, 1836, 15 S. 159.

[7] *Cowan* v. *Dick's Trs.*, *supra*; *Elliot* v. *Bowhill*, 1873, 11 M. 735.

[8] *Balfour* v. *Balfour's Trs.*, 1842, 4 D. 1044, and cases there cited.

[9] *Balfour* v. *Balfour's Trs.*, *supra*, per Lord Medwyn.

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[1] M'Laren on Wills, i. 755.

[2] *Johanson* v. *Johanson's Trs.*, 1898, 1 F. 244; *Robertson* v. *Robertson's Trs.*, 1838, 16 S. 554; *M'Laren* v. *Howie*, 1869, 8 M. 106.

[3] *Berry* v. *Berry's Trs.*, 1847, 19 Scot. Jur. 447; 1 Cl. & F. 71. In the following cases payments were held to be in satisfaction of provisions: *Buchanan* v. *Mathison*, 1824, 2 Shaw's Apps., 445; *Burrell's Exrs.* v. *Burrell*, 1828, 6 S. 801; *Robertson* v. *Robertson's Trs.*, *supra*; *Berry* v. *Berry's Trs.*, *supra*; *Hutchison* v. *Skelton*, 1856, 2 Macq. 492; *Johanson's* v. *Johanson's Trs.*, *supra*. For cases in which a different conclusion was reached see *Scott* v. *Scott*, 1846, 8 D. 791; *Fyfe* v. *Kedslie*, 1847, 9 D. 853; and *White* v. *White*, 1841, 3 D. 468.

[4] 1856, 2 Macq. 492.

[5] *Smith's Trs.* v. *Sellar*, 1894, 21 R. 633; see also *Johanson* v. *Johanson's Trs.*, *supra*; *Berry* v. *Berry's Trs.*, *supra*.

LEGACY DUTY.

See ESTATE AND OTHER DEATH DUTIES.

LEGAL.

See ADJUDICATION.

LEGITIM.

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SECTION 1.—DEFINITION.

303. Legitim (*legitima portio*), or bairn's part of gear, is a right to a share of the free moveable estate of their father, or of their mother, which vests *ipso jure* in the children on the parent's death. The share extends to one-third of the whole free moveable estate of the first deceasing parent, and to one-half of the whole free moveable estate of the last deceasing parent. In other words, if, *e.g.*, the father be survived by a widow and children, his moveable estate is divided into three equal parts, whereof one vests in the widow by virtue of *jus relictæ*; one vests in the children as legitim; and the remaining third is dead's part, of which last he may dispose by will. If, on the other hand, a father is survived by children only, his moveable estate is divided into two parts, one of which is legitim, and the other dead's part. When a wife was survived by a husband whom she had divorced for desertion, and a child, the division was tripartite for the purpose of ascertaining the legitim fund.[1]

304. Previous to the passing of the Married Women's Property Act, 1881,[2] legitim was claimable only from the father's estate; but that Act gives children an equal right in the case of the estate of their mother, and provides [3] that "After the passing of this Act the children of any woman who may die domiciled in Scotland shall have the same right of legitim in regard to her moveable estate which they have according to the law and practice of Scotland in regard to the moveable estate of their deceased father, subject always to the same rules of law in relation to the character and extent of the said right, and to the exclusion, discharge, or satisfaction thereof, as the case may be."

305. The right vests in the children by their survivance of the parent; and the parent can neither deprive them of it nor even apportion it among them against the equal distribution which the law enjoins.[4]

GENERAL AUTHORITIES—Stair, Inst. iii. 8, 43–52; Bankt. iii. 8, 1; Ersk. Inst. iii. 9, 15–25; Ersk. Prin. iii. 9, 5–10; Bell's Prin., ss. 1582–90; Fraser, H. & W., pp. 993–1057; M'Laren, Wills, pp. 123–132, 135–142.

[1] *Gavin's Trs.* v. *Walker's Trs.* (O.H.), 1907, 15 S.L.T. 681.

[2] 44 & 45 Vict. c. 21.

[3] Sec. 7.

[4] *Monteith* v. *Monteith's Trs.*, 1882, 9 R. 982, per Lord Young at p. 994.

SECTION 2.—WHAT CHILDREN ENTITLED TO LEGITIM.

306. All children of the same parent, although they be by different marriages, share equally in legitim.[1] A posthumous child is entitled to legitim.[2] The issue of a child who has predeceased the parent are not entitled, there being no representation in legitim,[3] but the claims of children who survive the parent pass to their executors, although not put forward by them during their lives.[4]

SECTION 3.—WHAT ESTATE SUBJECT TO LEGITIM.

307. The fund from which legitim is payable is the whole moveable estate of which the parent was possessed at the time of his death. Policies of insurance "current at death, and kept up by the payment of the premiums, form part of the moveable estate of the deceased person by whom they have been effected."[5] Succession to which the parent was entitled at the time of his death is included. So also are mortgages over lands in England.[6] But heritable securities made moveable estate by the Titles to Land Consolidation (Scotland) Act, 1868, are expressly excluded from the legitim fund,[7] as are real burdens under the Conveyancing (Scotland) Act, 1874.[8] There is a class of heritable bond, moveable as regards the rights of children but heritable *quoad jus relictæ*, which formerly required special treatment in the ascertainment of the legitim fund,[9] but by the Conveyancing (Scotland) Act, 1924, estate subject to legitim is now equally subject to claims for *jus relictæ* and *jus relicti*.[10]

308. The amount of the fund from which legitim is payable may be diminished by any deed *inter vivos* of the parent alienating his moveable estate,[11] provided such deed is not a simulate transaction, fraudulently contrived for the purpose of disappointing the right of the children, without touching the parent's own right during his lifetime.[12] The real question is not what was done in form, but what was intended in substance; the mere form must yield to the actual purpose.[13] Legitim cannot be diminished or defeated by a *mortis causa* deed.[14] An important point as to a parent's power to withdraw part of his estate from the legitim fund has been raised but not decided—reduction on the ground of deathbed has been abolished, in so far as relates to deeds, instruments, or writings, but the question has been raised as to whether this ground of reduction has been taken away also with respect to gifts made without writing.[1]

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[1] *Chapman* v. *Gibson*, 1631, Mor. 8163; *Henderson* v. *Sanders*, 1634, Mor. 8164.

[2] *Jervey* v. *Watt*, 1762, Mor. 8170.

[3] Fraser, H. & W., p. 995.

[4] *M'Murray* v. *M'Murray's Trs.*, 1852, 14 D. 1048.

[5] *Chalmers' Trs.* v. *Chalmers*, 1882, 9 R. 743.

[6] *Monteith* v. *Monteith's Trs.*, 1882, 9 R. 982.

[7] 31 & 32 Vict. c. 101, s. 117.

[8] 37 & 38 Vict. c. 94, s. 30.

[9] *Dawson's Trs.* v. *Dawson*, 1896, 23 R. 1006.

[10] 14 & 15 Geo. V. c. 27, s. 22 (1).

[11] *Agnew* v. *Agnew*, 1775, Mor. 8210; *Skinner* v. *Beveridge*, 1872, 10 S.L.R. 12; *Boustead* v. *Gardner*, 1879, 7 R. 139; *Hutton's Trs.* v. *Hutton's Trs.*, 1916 S.C. 860.

[12] *Lashley* v. *Hog*, 1804, 4 Pat. 581; *Millie* v. *Millie*, 1807, 5 Pat. 160; *Nicolson's Assignee* v. *Macalister's Trs.*, 1841, 3 D. 675.

[13] *Buchanan* v. *Buchanan*, 1876, 3 R. 556, at p. 559.

[14] M'Laren, Wills, p. 129; *M'Leod* v. *Love*, 1914 S.C. 983.

Section 4.—Computation of Legitim.

309. The amount of the legitim is determined by the value of the free moveable estate of the parent, to be ascertained at the date of his death.[2] The debts deducted before the legitim is computed include provisions to spouse and children by antenuptial contract, funeral expenses, and the expenses of confirmation.[3] By the Conveyancing (Scotland) Act, 1924, it is provided that "All debts which if due to any person dying after the commencement of this Act would, according to the present law and practice or in terms of this section, be subject to legitim and *jus relictæ* or *jus relicti* shall, if due by the deceased or out of his or her estate, form, so far as the estate on which such debts are secured may be insufficient to meet the same, deductions from the deceased's moveable estate before ascertaining legitim and *jus relictæ* or *jus relicti*." [4] The executor is not entitled to debit the legitim with a share of losses arising from improper investments, or from the default of a factor,[5] or any losses incurred after realisation of the estate.[6] On the other hand, legitim, being a debt to be measured by the amount of the fund at the parent's death, does not infer a right to participate in the profits realised by the application of the fund after the parent's death,[7] except by special arrangement.[8] Where, however, from any cause payment of legitim is postponed, interest thereon is due from the date of the parent's death.[9] As a rule such interest will be limited to the amount actually earned,[10] but in some cases the full legal rate has been awarded.[11] The party entitled to legitim is not entitled to demand a share of the *ipsa corpora* of the deceased's estate.[12]

Section 5.—Discharge and Satisfaction.

310. The right to claim legitim may be extinguished either by discharge or by satisfaction. The right is discharged when it is excluded by the antenuptial contract of the parents, expressly [13] or by a total settlement inconsistent with the right; [14] or when it is excluded by the child's own deed.[1] In the former case it is thought that some provision, however small, must be given in place of the legitim.[2] In the latter case the validity of the discharge will be determined by ordinary principles. Thus a trustee in bankruptcy was held entitled to reduce as gratuitous a discharge of legitim granted by a bankrupt during his father's lifetime.[3] When the right to claim legitim is discharged, the benefit goes to the other children whose rights have not been excluded.[4] Renunciation is not to be inferred by implication.[5]

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[1] *Hay* v. *Coutts' Trs.*, 1890, 18 R. 244. See Deathbed, Vol. V. p. 439, *ante*.

[2] *M'Murray* v. *M'Murray's Trs.*, 1852, 14 D. 1048.

[3] M'Laren, Wills, pp. 126, 127.

[4] 14 & 15 Geo. V. c. 27, s. 22 (2).

[5] *Earl of Dalhousie* v. *Crokat*, 1868, 6 M. 659.

[6] *Russel* v. *Attorney-General*, 1917 S.C. 28.

[7] *M'Murray*, *supra*; *Gilchrist* v. *Gilchrist's Trs.*, 1889, 16 R. 1118.

[8] *Ross* v. *Masson*, 1843, 5 D. 483.

[9] *Minto* v. *Kirkpatrick*, 1833, 11 S. 632.

[10] *Ross* v. *Ross*, 1896, 23 R. 802; *Grant* v. *Grant's Trs.*, 1898, 25 R. 948.

[11] *Gilchrist*, *supra*; *Bishop's Trs.* v. *Bishop*, 1894, 21 R. 728.

[12] *Cameron's Trs.* v. *Maclean*, 1917 S.C. 416.

[13] *Maitland* v. *Maitland*, 1843, 6 D. 244.

[14] *Fisher's Trs.* v. *Fisher*, 1844, 7 D. 129.

311. The legal claim is satisfied when a testamentary provision is given and accepted in place of it, the renunciation of the legal claim being made a condition of the gift, either expressly or by a total settlement inconsistent with the right. In this case the child has the right of election between the legal right and the conventional provision. If he elects to take the conventional provision, his share of the legitim is added to the dead's part [6] (see ELECTION [7]).

312. The right to legitim may also be extinguished, either wholly or partially, by the operation of the doctrine of Collation [8] (see COLLATION [9]).

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[1] M'Laren, Wills, p. 137; *Scott's Trs.* v. *Scott* (O.H.), 1902, 40 S.L.R. 133; 10 S.L.T. 301.

[2] *Earl of Kintore* v. *Countess Dowager of Kintore*, 1884, 11 R. 1013; 1886, 13 R. (H.L.) 93; *Simpson's Trs.* v. *Taylor*, 1912 S.C. 280.

[3] *Obers* v. *Paton's Trs.*, 1897, 24 R. 719.

[4] *Lord Panmure* v. *Crokat*, 1856, 18 D. 703.

[5] *Rait* v. *Arbuthnott*, 1892, 19 R. 687; *Crellin* v. *Muirhead's Judicial Factor*, 1892, 20 R. 51.

[6] *Fisher* v. *Dixon*, 1840, 2 D. 1121; 1841, 3 D. 1181; 1843, 2 Bell App. 63.

[7] Vol. VI. p. 127, *ante*.

[8] M'Laren, Wills, p. 140.

[9] Vol. III. p. 476, *ante*.

LEGITIMATION.

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SECTION 1.—LEGITIMATION IN ROMAN LAW.

313. In the time of Justinian, *liberi naturales*—children born of *concubinatus*—could be subjected to their father's *potestas* by legitimation in three ways—(1) *per oblationem curiæ*; (2) *per rescriptum principis*; (3) *per subsequens matrimonium*. (1) Legitimation *per oblationem curiæ*, introduced by Theodosius II. in A.D. 443, was effected by the father entering a natural son as a *decurio* in a provincial municipality.[1] A natural daughter, on marrying a *decurio*, was also legitimated.[2] (2) Under Justinian a rescript of legitimation *per rescriptum principis* might be issued on petition by a father, or on a request made in his will.[3] (3) Legitimation *per subsequens matrimonium* had its origin in a constitution of Constantine,[4] and was finally regulated by Justinian in a series of enactments.[5] The legislation of Justinian allowed legitimation by subsequent marriage provided the marriage was attested by *instrumentum dotis*, or other writing, and there had been no legal impediment to the marriage of the parents at the date of the child's conception. It was also required that the children should consent to legitimation, for no one was made legitimate against his will.[6] Legitimation in Roman law was confined to children born of *concubinatus*—a union recognised by social custom and, to certain effects, by law.

SECTION 2.—LEGITIMATION IN CANON LAW.

314. The doctrine of legitimation by subsequent marriage was established in canon law by two rescripts of Pope Alexander III., which are preserved in the Decretals of Gregory.[7] *Tanta est enim vis sacramenti* [*matrimonii*] *ut qui antea sunt geniti post contractum matrimonium*

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[1] Inst. i. 10, 13; Cod. v. 27, 9.

[2] Cod. v. 27, 3, 4.

[3] Novv. lxxiv. 1, 2; lxxxix. 9.

[4] The tenor of this constitution is set out in an enactment of Zeno—Cod. v. 27, 5.

[5] Cod. v. 27, 8, 10, 11.

[6] Nov. lxxxix. 11.

[7] Decr. iv. 17, 1; iv. 17, 6.

habeantur legitimi.[1] Children so legitimated are held to be in the same situation as to relationship, family, and succession as if they had been legitimate by birth. Various canons, however, explicitly rule that any person born outwith legitimate wedlock, though rendered legitimate by subsequent marriage, cannot be appointed to certain high ecclesiastical dignities. This mode of legitimation applied to all *naturales liberi*, —children born of parents who could legally have married at the date of the child's conception, as distinct from *spurii*—children born of parents who could not legally have married at the date of the child's conception. There is indeed some conflict of opinion on the question whether under the canon law the date of the procreation of the child or the date of the birth of the child is to be regarded as the critical date. But the weight of authority seems to be in favour of the view that, in order that the intermarriage of the parents may render the child legitimate, it is essential that there should have been no impediment to their marriage at the date of the procreation of the child.

315. The principle of legitimation *per subsequens matrimonium* was adopted in France,[2] in Germany,[3] and in most other countries of continental Europe. It has now been accepted by nearly all the States of the United States of America, Within the British Empire it has long been recognised in those overseas dominions and possessions in which the law is based on Roman law, *e.g.* South Africa, Quebec, Ceylon; and it has also been introduced by legislation into many British dominions in which, generally speaking, the common law of England obtains.[4]

Section 3.—Legitimation in Scots Law.

316. Scots law recognises two modes of legitimation—(1) Legitimation *per subsequens matrimonium*, (2) legitimation *per rescriptum principis*.

Subsection (1).—Per subsequens matrimonium.

(i) *Reception of the Doctrine.*

317. The doctrine of legitimation *per subsequens matrimonium*, though not received by the most ancient customs of Scotland,[5] was adopted into Scots law at an early period.[6] The recognition of the doctrine by Scots law rested on grounds of justice and morality,[7] but its early acceptance was undoubtedly due mainly to the influence of the canon law. "It is true that we never did adopt, in general, the canon law as an imperative and absolute rule of practice. But when we find that in a particular branch of law, appropriated to the ecclesiastical courts, a general rule of the canon law, which those Courts certainly administered, has been adopted into our own municipal system, it would be difficult to deny, on reasonable grounds, that that was the source from which we adopted it."[1] The legitimation of previous offspring by the marriage of the parents is the result solely of law, and does not in any degree depend on the intentions of the parents. It is "the gift or legal result of the law, as applicable to certain facts and circumstances—the value and effect of which must be judged of by the law alone, independent altogether of the intentions or expectations of the parents."[2] The doctrine of Roman law that legitimation could not take place without the consent of the children, forms no part of the law of Scotland.[3]

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[1] Decr. iv. 17, 6. [2] Code Civil, Art. 331. [3] German Civil Code, Art. 1719.

[4] *E.g.* New South Wales, Victoria, Tasmania, South Australia, Queensland, Western Australia, New Zealand, Ontario, Manitoba, Saskatchewan, British Columbia.

[5] Reg. Maj. ii. 51, 2. [6] Ersk. Inst. i. 6, 52.

[7] *Vide* opinions in *Kerr* v. *Martin*, 1840, 2 D. 752.

(ii) *Requisites.*

318. The balance of authority is in favour of the view that in Scots law a child is not legitimated by the subsequent marriage of its parents if there existed, at the date of the child's conception, a legal impediment to the parents' marriage. Thus a child conceived in adultery cannot be legitimated, even though at the date of its birth the parents were free to marry.[4] The reasoning of the majority of the judges in *Kerr* v. *Martin*[5] goes strongly to support the doctrine that, in determining whether legitimation is possible in Scots law, the date of the child's conception is to be taken as the decisive date. Opinions, however, have been expressed in favour of the view that the date of the child's birth is to be looked to if that date be more favourable for the legitimation than the date of the child's conception.[6] Lord Fraser,[7] who sets forth the authorities on the one side and on the other, observes that the opinion that the time of conception and not of birth is to be looked to is more in accordance with the genius of Scotch law, which tests the possibility of legitimation by the question, "Could the parents at the time of conception have lawfully married."

319. In *Kerr* v. *Martin*[5] it was held by a narrow majority of the judges in the Court of Session, after an elaborate argument, that the marriage of either of the parents with a third person, after the birth of a natural child, formed no bar to the legitimation of the child by the subsequent marriage of the parents. A marriage, in order to effect the legitimation of previous issue, need not be a public or regular marriage.[8] The question may arise as to whether a child born of a woman before marriage is the child of the man whom she subsequently marries. In such a case proof is allowed as to whether the person claiming to have been legitimised by the subsequent marriage is the child of the two persons whose child he alleges himself to be.[1] The French law gets rid of the necessity for such inquiries by requiring that the children shall be recognised by the married persons as their children, before the marriage or at the time of its celebration. After marriage any acknowledgment or recognition of the children is unavailing in France.

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[1] Per Lord Fullerton in *Kerr* v. *Martin*, 1840, 2 D. 752, at p. 794.

[2] *Munro* v. *Munro*, 1840, 1 Rob. App. 492, at p. 504.

[3] *Home* v. *Macfarlane* (O.H.), 1908, 16 S.L.T. 123 (Lord Mackenzie).

[4] Bankt. i. 5, 54; Ersk. Inst. i. 6, 49; Bell's Prin., s. 1627; Pothier, Tr. de Mariage, Par. 5, C. 2, No. 415.

[5] 1840, 2 D. 752.

[6] *Vide dicta* of the Lord Chancellor in *Munro* v. *Munro*, 1840, 1 Rob. App. 492, at pp. 601 and 603.

[7] Parent and Child, 3rd ed., at p. 41.

[8] *M'Adam* v. *Walker*, 1807, Mor. App. "Proof" No. 4; affd. 1813, 1 Dow 148. In *Lauderdale Peerage*, 1885, 10 App. Cas. 692, legitimation was effected by a marriage on deathbed.

(iii) *Effects.*

320. Children legitimated by the subsequent marriage of their parents have all the rights of lawful children. They are entitled to legitim and take under a destination to lawful children. If they be sons, they exclude, by their right of primogeniture, the sons procreated after the marriage from the succession of the father's heritage, though these sons were lawful children from their birth.[2] In short, a child legitimated by the subsequent marriage of his parents has, in a question with children born of his parents in lawful wedlock, the same rights as he would have enjoyed if he had been born in lawful wedlock. When two or more previously born children become legitimated at the same time by the subsequent marriage of their parents they rank as between themselves in order of seniority.[3] Further, if a child born out of wedlock dies before the marriage of his parents, leaving lawful issue living at the date of such marriage, the marriage of his parents operates to confer on his issue all the rights which belong to the issue of one lawfully born.[4] In Scots law the legitimation operates from the time of the marriage only, and not from the time of the birth.[5]

321. Where there are lawful children of an intervening marriage of one of the parents of an illegitimate child with a third person—that is, intervening between the birth of the illegitimate child and the subsequent marriage of his parents—the child legitimated by the later marriage is not entitled, in respect of priority of birth, to any preference which would defeat or prejudice the rights of the children of the intervening marriage. A child legitimated by such a second marriage is, it would appear, in the position of being the eldest lawful child of the second marriage.[6] Where the father of an illegitimate child had, after the death of the child, married the mother, and sought to recover damages on the ground that the death of the child had been caused by the fault or negligence of the defender, it was held that he had no title to sue.[1] The reasoning upon which the judgment proceeded was that, at the date of the child's death, the pursuer had no title to claim damages in respect of the death, and that by thereafter marrying the mother of the child he could not acquire rights against third parties which he did not possess at the date of the child's death.

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[1] *Innes* v. *Innes*, 1835, 13 S. 1050; affd. 1837, 2 S. & M'L. 417.

[2] Ersk. Inst. i. 6, 52.

[3] Cp. in England, Legitimacy Act, 1926, 16 & 17 Geo. V. c. 60, s. 3 (2).

[4] Bankt. i. 558; Bell's Prin., s. 1267; More's Notes, Stair, p. xxxiii; *Rose* v. *Ross*, 1830, 4 W. & S.—Opinions of Judges of the Court of Session, Appendix IV., per Lord Meadowbank at p. 72; cp. per Lord Moncreiff in *M'Neill* v. *M'Gregor*, 1901, 4 F. 123, at p. 127. In England effect is given to this principle in s. 5 of the Legitimacy Act, 1926.

[5] *Shedden* v. *Patrick*, 1854, 1 Macq. 535.

[6] *Vide* opinions in *Kerr* v. *Martin*, 1840, 2 D. 752; Bell's Prin., s. 1627; Fraser, Parent and Child, 3rd ed., pp. 41 and 42; *M'Neill* v. *M'Gregor*, *supra*, per Lord Trayner at p. 126, and per Lord Moncreiff at p. 128; cp. in England, s. 3 (2) of the Legitimacy Act, 1926.

322. A declarator of legitimacy is competent only in the Court of Session. It is competent for a person to raise an action of declarator,[2] either of his own legitimacy [3] or of the legitimacy of one of his ancestors.[4] The Registration of Births, Deaths, and Marriages (Scotland) Act, 1854, [5] s. 36, provides that, in the event of any child, registered as illegitimate, being legitimated *per subsequens matrimonium*, where the paternity of the child has been acknowledged by the father signing the register of births or has been found by decree of any competent Court, the registrar of the parish in which the birth of the illegitimate child was registered shall, upon production of an extract of the entry of the marriage in the register of marriages, note on the margin of the register, opposite the entry of the birth, the legitimation of the child *per subsequens matrimonium* and the date of the registration of the marriage; and that, where the paternity has not been acknowledged by the father signing the register of births or has not been determined by decree, the registrar shall not note any such legitimation or marriage opposite to the entry of the birth of the child unless authorised to do so by warrant of the Sheriff granted upon the joint application of both parents. In contrast to judicial records, the register of Births, Deaths, and Marriages kept under the Act of 1854, though admissible as evidence to the effect that the entries appearing therein were duly made in compliance with the statute, is neither by the Act itself, nor according to legal principle, evidence of the facts which the entries profess to record.[6]

Subsection (2).—*Legitimation* per rescriptum principis.

323. Legitimation *per rescriptum principis* has also been recognised to certain effects in Scotland. After the fall of the Roman Empire the Popes assumed this prerogative of the Roman emperors, and their dispensations not infrequently contained clauses legitimating children.[1] In Scotland it would seem that such papal legitimation conferred legitimacy only *quoad spiritualia* so as to enable the legitimated persons to hold office in the Church, and not *quoad civilia* so as to give them rights of succession. Even before the Reformation rescripts by the sovereign, embodied in royal letters of legitimation, were issued by the Scottish kings. This mode of legitimation is strictly limited in its effects. It does not confer on the legitimated person an active right of succession *ab intestato* to any of his relations by blood, nor give him a claim for legitim with the lawful children of his father; for the king could not by any prerogative cut off the private right of third parties.[2] It is merely a resignation by the sovereign of his right of succession to the bastard.[3] By letters of legitimation, those who would have succeeded if the bastard had been legitimate may acquire a right to take his succession as if legal heirs.[4]

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[1] *M'Neill* v. *M'Gregor, supra.*

[2] *Benson* v. *Benson*, 1854, 16 D. 555. Under s. 5 of the Sheriff Courts Act, 1907, the jurisdiction of the Sheriff Court extends to and includes actions of declarator, but an exception is made in the case of, *inter alia*, actions the direct or main object of which is to determine the personal status of individuals. An action of declarator to determine the paternity of an illegitimate child appears now to be competent in the Sheriff Court although there is no conclusion for aliment—*M'Donald* v. *Ross*, 1929 S.C. 240, at pp. 252 and 253.

[3] *Morley* v. *Jackson*, 1888, 16 R. 78.

[4] *Moncreiff* v. *Lord Moncreiff*, 1904, 6 F. 1021 ; *Bosville* v. *Lord Macdonald*, 1910 S.C. 597. The pursuers' interest to establish the *jus sanguinis* probably constitutes in itself a sufficient interest, without the assertion of any other interest—*vide Moncreiff* v. *Lord Moncreiff, supra*, per Lord Kinnear at p. 1026 ; and *Bosville* v. *Lord Macdonald, supra*, per Lord Pres. Dunedin at p. 608.

[5] 17 & 18 Vict. c. 80.

[6] Per Lord Pres. Clyde in *M'Donald* v. *Ross, supra*, at p. 247.

SECTION 4.—LEGITIMATION IN ENGLISH LAW.

324. In England, in the year 1235, an attempt was made by the bishops to introduce the canon law rule of legitimation by subsequent marriage. But the barons refused to consent to the proposed change, declaring *nolumus leges Angliæ mutare.*[5] Accordingly, until the passing of the Legitimacy Act, 1926,[6] the rule of English law was that an illegitimate child remained illegitimate until the day of his death, unless legitimated by a special Act of Parliament. Under the Act of 1926 (s. 1 (1)), where the parents of an illegitimate person marry, or have married, one another, whether before or after 1st January 1927, and the father was, or is, at the date of the marriage domiciled in England or Wales, the marriage renders that person, if living, legitimate from 1st January 1927, or from the date of the marriage, whichever last happens. The Act does not legitimate a person whose father or mother was married to a third person when the illegitimate person was born (s. 1 (2)). The effect of other provisions of the Act is that a legitimated child is treated as being for all purposes legitimate, except that he cannot inherit or transmit a right to succeed to any dignity or title of honour or any property settled to go with it.

325. Sec. 188 of the Supreme Court of Judicature Act, 1925,[7] enacts that any natural-born British subject may, if he is domiciled in England or Northern Ireland, or claims any real or personal estate situate in England, apply by petition to the Court[8] for a decree declaring him to be the legitimate child of his parents. The application of this enactment has been extended by s. 2 (1) of the Legitimacy Act, 1926, which, as amended by the Administration of Justice Act, 1928,[1] Sched. I., Part III., provides that a person claiming that he or his parent or any remoter ancestor became, or has become, a legitimated person may, whether domiciled in England or elsewhere, and whether a natural-born British subject or not, present a petition under s. 188 of the Supreme Court of Judicature Act, 1925. A declaration of legitimacy ascertains parentage and determines status, and all parties whose interests may be affected must be before the Court.[2] "Any proceeding for declaration of legitimacy must be so constituted in respect of parties that interests obviously affected shall be represented." [3]

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[1] Fraser, Parent and Child, 3rd ed. p. 51.

[2] Ersk. Prin., iii. 10, 3.

[3] Stair, iii. 3, 45; Ersk. iii. 10, 7.

[4] Bell's Prin., s. 2064.

[5] Statute of Merton, 20 Hen. III. c. 8.

[6] 16 & 17 Geo. V. c. 60.

[7] 15 & 16 Geo. V. c. 49.

[8] A petition may be presented by any such person to the County Court instead of to the High Court—Legitimacy Act, 1926, s. 2 (2).

Section 5.—International Law.

Subsection (1).—*What Law applicable.*

326. The fundamental difference which existed until recent times between the law of England, and of countries retaining the common law of England, and the law of Scotland and other countries with respect to the status of persons born outwith lawful wedlock whose parents have subsequently married one another, gave rise to questions of considerable difficulty. The fact that the principle of legitimation *per subsequens matrimonium* has now been established by legislation in English law, and in most other legal systems based on English law, has substantially lessened the number and importance of these questions. It has long been settled that, in determining whether an illegitimate child is legitimated by the subsequent marriage of his parents, the domicile of the mother, or the place of the child's birth, or the place of the marriage is immaterial, and that the system of law applicable is that of the domicile of the father.[4]

327. Where the father's domicile at the date of the marriage is different from his domicile at the date of the birth of the child, there has been considerable conflict of opinion as to whether, in order to enable the child to become legitimate by the subsequent marriage, it is sufficient that the father at the time of the marriage is domiciled in a country allowing legitimation by subsequent marriage, or whether it is necessary that the father, both at the date of the marriage and at the date of the birth of the child, be domiciled in a country (though not necessarily the same) which attributes to marriage that effect. The trend of Scots authority has been in favour of the doctrine, laid down by Savigny,[5] that the law of the domicile of the father at the date of the marriage is decisive.[6] In England, after considerable fluctuation of opinion, it had become a fixed rule that, to enable a child to be recognised by English law as legitimated by virtue of the subsequent marriage of his parents, the father's domicile, both at the date of the child's birth and at the date of the marriage, must be in a country the law of which admits of legitimation *per subsequens matrimonium*.[1]

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[1] 18 & 19 Geo. V. c. 26.

[2] *Bednall* v. *Bednall*, [1927] P. 225 ; *Re Clayton's Petition*, 1927, 43 T.L.R. 659.

[3] Per Lord Merrivale in *Green* v. *Green*, [1929] P. 101, at p. 104.

[4] *Munro* v. *Munro*, 1840, 1 Rob. App. 492 ; *In re Wright's Trusts*, 1856, 2 K. & J. 595, per Page Wood V.C., at pp. 610 and 614 ; *Udny* v. *Udny*, 1869, 7 M. (H.L.), 89.

[5] Savigny, Syst., s. 380 (Guthrie, 2nd ed., at p. 302).

[6] *Munro* v. *Munro*, 1840, 1 Rob. App. 492—*vide* Opinion of the Scottish Judges ; also per Lord Cottenham at p. 605, and Lord Brougham at pp. 614, 621, and 625 ; *Udny* v. *Udny*,

328. As regards England, this rule has been altered by the Legitimacy Act, 1926, which accepts the father's domicile at the time of the marriage as determining legitimacy, irrespective of his domicile at the time of the child's birth. Under s. 8 of that Act, where the parents of an illegitimate person marry, or have married, one another, whether before or after 1st January 1927, and the father of the illegitimate person was, or is, at the time of the marriage, domiciled in a country other than England or Wales, by the law of which the illegitimate person became legitimated by virtue of such subsequent marriage, that person, if living, will be recognised in England and Wales as having been so legitimated from 1st January 1927 or from the date of the marriage, whichever last happens, notwithstanding that the father was not at the time of the birth of such person domiciled in a country in which legitimation by subsequent marriage was permitted by law. For the purposes of this section, the expression country includes Scotland and any other part of His Majesty's dominions as well as a foreign country.

329. Again, it was a rule of English law that a child legitimated *per subsequens matrimonium* could not succeed as heir *ab intestato* to English land,[2] and that he, dying intestate, could not be succeeded, so far as real estate in England is concerned, by his father.[3] This disability as to succession has now been removed. Under s. 3 (1) of the Legitimacy Act a legitimated person and his spouse, children, or more remote issue are entitled to take any interest (*a*) in the estate of an intestate dying after the date of legitimation ; (*b*) under any disposition coming into operation after that date; (*c*) by descent, unless an entailed interest created after that date, in like manner as if he had been born legitimate. Under s. 3 (2), where the right to property, real or personal, depends on the relative seniority of the children of any person, and those children include one or more legitimated persons, the legitimated person or persons rank as if born on the date of legitimation; and among themselves

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supra. In both these cases, however, it was found that the father's domicile was Scottish, both at the date of the child's birth and at the date of the marriage, so that it was unnecessary to decide whether the child would have become legitimate by the subsequent marriage of his parents if the father's domicile at the date of the child's birth had been English.

[1] *Udny* v. *Udny*, 1869, 7 M. (H.L.) 89, per Lord Hatherley L.C. at p. 94 ; *In re Grove* ; *Vaucher* v. *Solicitor to the Treasury*, 1888, 40 Ch. D. 216.

[2] *Birtwhistle* v. *Vardill*, 1839, 7 Cl. & Fin. 895 ; *In re Goodman's Trusts*, 1881, 17 Ch. D. 266, per James L.J. at p. 298 ; *Fenton* v. *Livingstone*, 1859, 3 Macq. 497, per Lord Wensleydale at p. 547.

[3] *Re Don's Estate*, 1857, 4 Drew. 194. The rule stated in the text operated only in the case of intestacy. Thus a child, legitimated by the subsequent marriage of his father and mother, was entitled to share equally with his brothers born after the marriage in a devise of real estate to " children." *In re Grey's Trusts*, [1892] 3 Ch. 88.

they rank in order of seniority. Sec. 4 enacts: "Where a legitimated person, or a child or remoter issue of a legitimated person, dies intestate in respect of all or any of his real or personal property, the same persons shall be entitled to take the same interests therein as they would have been entitled to take if the legitimated person had been born legitimate."

SUBSECTION (2).—*Recognition of Foreign Status of Legitimacy.*

330. The general rule that the status of legitimacy arising from the intermarriage of the parents, when once established by the *lex domicilii*, is recognised by other countries is subject to qualification in questions as to succession to property, where the marriage, though valid by the law of the domicile, is not a marriage recognised in the country where the question of succession arises.[1] In order that full effect be given to the legal consequences of a foreign status of legitimacy arising from marriage, the "marriage" must be marriage as understood in Christendom.[2] In Scotland, as in England, when the property, the succession to which is in question, is moveable, a status of legitimacy assigned to a child by the law of his domicile is accepted.[3] But, where the succession to heritable estate is in question, it would appear that the *lex rei sitæ* is alone regarded, and that, if the claimant is the child of a union which is incestuous, or polygamous, or something essentially different from marriage according to our ideas of that institution, it will not avail him that he is legitimate by the law of his domicile.[4] The disability to which legitimated persons are subject under English common law, with respect to succession on intestacy to English land[5] is not removed by the Legitimacy Act, 1926, as regards the offspring of marriages which, though valid by the law of the domicile, are not recognised under English law as valid for persons domiciled in England.[6]

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[1] *Vide* discussions in *Fenton* v. *Livingstone*, 1859, 3 Macq. 497.

[2] *Hyde* v. *Hyde*, 1866, L.R. 1 P. & D. 130; *In re Bethell*, 1888, 38 Ch. D. 220; *Brinkley* v. *Att.-Gen.*, 1890, 15 P.D. 76.

[3] *Shaw* v. *Gould*, 1868, L.R. 3 H.L. 55, per Lord Cranworth at p. 70; *In re Goodman's Trusts*, 1881, 17 Ch.D. 266.

[4] *Fenton* v. *Livingstone*, *supra*, per Lord Wensleydale at p. 447.

[5] See para. 329 *supra*.

[6] Dicey, Conflict of Laws (4th ed.)—Note on Legitimation at p. 905.

LENOCINIUM.

See DIVORCE.

LETTERS OF CREDIT.

See BANK.

LETTERS OF FOUR FORMS.

See DILIGENCE.

LETTERS OF HORNING.

See CHARGE; DILIGENCE.

LETTERS PATENT.

See PATENTS.

LEWD PRACTICES.

See CRIME.

LIBERATION.

See CRIME (PROCEDURE).

LIBRARIES.

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SECTION 1.—PRIVILEGES UNDER COPYRIGHT ACTS.

SUBSECTION (1).—*History.*

331. Under the earliest Copyright Act of 1709 [1] the libraries of the four Scottish Universities and the library of the Faculty of Advocates were (along with certain other libraries, some of which had had this privilege for more than half a century) entitled to receive, on demand, a free copy of every book entered at Stationers Hall. The subsequent Copyright Acts [2] continued this privilege (with certain modifications and an extension of the privilege to other libraries in England and Ireland) until the Copyright Act of 1836 [3] was passed. That Act withdrew the privilege from, *inter alia*, the four Scottish Universities, and enacted that compensation for the loss of the privilege should be paid annually to these Universities in respect of the libraries under their control, the amount being the average value of the books received by each of the libraries for the three years prior to the Act. The sums paid annually since 1836 to the Scottish Universities in respect of that compensation are: Edinburgh University, £575; Glasgow University, £707; St. Andrews University, £630; King's College, Aberdeen, £320.

332. The Faculty of Advocates alone continued to enjoy the privilege of receiving, for their library, a free copy of every book entered at Stationers Hall, and to administer their library as the only complete public library in Scotland. In 1911 the Copyright Act of that year [4] repealed most of the previous Copyright Acts and consolidated the statutory law on the subject, retaining the copyright privilege for, *inter*

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[1] 8 Anne, c. 19.

[2] 41 Geo. III. c. 107; 54 Geo. III. c. 156; 5 & 6 Vict. c. 45.

[3] 6 & 7 Will. IV. c. 110.

[4] 1 & 2 Geo. V. c. 46.

alia, the library of the Faculty of Advocates and the annual compensation to the four Scottish Universities. The National Library of Scotland Act, 1925,[1] transferred the library of the Faculty of Advocates to the nation, including (s. 5) the privilege under the Copyright Act, 1911, the library to be called the National Library of Scotland, and to be under the administration of a board of trustees.

SUBSECTION (2).—*Delivery of Books.*

333. The Copyright Act, 1911, provides that the publisher of every book published in the United Kingdom must, within one month after publication, deliver, at his own expense, a copy of the book to the trustees of the British Museum, who must give a receipt therefor (s. 15 (1)). The publisher must also, if written demand is made before the expiration of twelve months after publication, deliver (within one month of that demand, or, if the demand was made before publication, within one month after publication) to a depot in London named in the demand a copy of the book for the authority having the control of each of the following libraries: the Bodleian Library, Oxford; the University Library, Cambridge; the Library of the Faculty of Advocates, Edinburgh (now the National Library of Scotland); the Library of Trinity College, Dublin; and the National Library of Wales. In the case of an encyclopædia, newspaper, review, magazine, or work published in a series of numbers or parts, the written demand may include all numbers or parts of the work which may be subsequently published (s. 15 (2)). The copy delivered to the trustees of the British Museum is to be a copy of the whole work, with all maps and illustrations belonging thereto, finished and coloured in the same manner as the best copies of the book are published and bound, sewed or stitched together on the best paper on which the book is printed (s. 15 (3)). The copy delivered to the other libraries is to be on the paper on which the largest number of copies of the book is printed for sale, and is to be in the same condition as the books prepared for sale (s. 15 (4)).

334. Failure to comply with the provisions of this section renders the publisher liable, on summary conviction, to a fine not exceeding five pounds and the value of the book, the fine to be paid to the authority to whom the book ought to have been delivered (s. 15 (6)). "Book," for the purposes of this section, includes every part or division of a book, pamphlet, sheet of letterpress, sheet of music, map, plan, chart, or table separately published, but not any second or subsequent edition of a book unless such edition contains additions or alterations either in the letterpress or in the maps, prints, or other engravings belonging thereto (s. 15 (7)). The provisions as to delivery of books to libraries are not to apply to works first published in a foreign country to which the Act has been applied by Order in Council (s. 29).

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[1] 15 & 16 Geo. V. c. 73.

SECTION 2.—PUBLIC LIBRARIES (SCOTLAND) ACTS, 1887 TO 1920.

SUBSECTION (1).—*Introductory.*

335. The statute law applicable to public libraries in Scotland is contained in the Public Libraries Consolidation Act, 1887,[1] the Public Libraries (Scotland) Act, 1894,[2] the Public Libraries (Scotland) Act, 1899,[3] and the Public Libraries (Scotland) Act, 1920.[4] These Acts may be cited as the Public Libraries (Scotland) Acts, 1887 to 1920, and the 1887 and 1894 Acts are to be construed as one Act.[5] The adoption of these Acts by municipalities is permissive, not compulsory.

SUBSECTION (2).—*Definitions.*

336. The Acts may be adopted by all burghs, including police burghs, and by all parishes for which a separate poor rate is, or can be, imposed, or for which a separate parochial board (now parish council [6]) is, or can be, appointed (exclusive of the area of any burgh or part thereof situated therein). The authority for the administration of the Acts, if adopted, is in all burghs the town council, and in parishes the parish council. In parishes partly landward and partly burghal the landward committee is the authority in the landward part.[7] "Householder" means, in the case of a burgh, all persons whose names are entered in the municipal register, and, in the case of a parish, all persons entitled to vote in the election of a school board (now education authority [8]) in such parish. The Act applies to "libraries" and "museums," which terms include "schools for science," "art galleries," and "schools for art."

SUBSECTION (3).—*Adoption of the* 1887 *Act.*

337. Upon the written requisition of the magistrates and council of any burgh, or of ten or more householders in any burgh or parish, the chief magistrate of the burgh, or, in the case of a parish, the sheriff of the county, is to ascertain the opinions of the householders in the burgh or parish as to the adoption of the Act. Where the number of householders in a burgh exceeds three thousand, the chief magistrate is to adopt the procedure, by way of voting paper, set forth in Schedule A annexed to the Act; but in any other case the chief magistrate or sheriff may adopt procedure either by voting papers or by way of public meeting (Schedule B) (s. 4). If the householders, by a majority of votes, determine not to adopt the Act in a burgh or parish, a similar procedure shall not take place until at least two years have elapsed since the date of the determination (s. 5). If the Act is not adopted, the expenses of the procedure for determining as to its adoption shall be paid either out of the burgh general assessment or, in the case of a parish, out of the assessment for relief of the poor, or, if there is no such assessment, by a rate which the parish council are empowered to levy and recover in the same way as the library rate. If, on the other hand, the Act is adopted, the expenses are payable out of the library rate, and, upon adoption of the Act, the chief magistrate or sheriff is empowered to borrow such sums as may be necessary to defray the expenses of adoption on the security of the library rate to be afterwards levied (s. 6).[1]

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[1] 50 & 51 Vict. c. 42.
[2] 57 & 58 Vict. c. 20.
[3] 62 Vict. c. 5.
[4] 10 & 11 Geo. V. c. 45.
[5] 57 & 58 Vict. c. 20, s. 1.
[6] The Local Government (Scotland) Act, 1894 (57 & 58 Vict. c. 58), s. 21.
[7] *Ibid.*, s. 23 (2).
[8] See the Education (Scotland) Act, 1918 (8 & 9 Geo. V. c. 48).

Subsection (4).—*Expenses of carrying Act into Execution.*

338. These expenses (including sums (1) payable in respect of interest and sinking fund for money authorised to be borrowed, (2) necessary for the maintenance and management of the libraries and museums established under the Act or to which the Act applies, or (3) necessary for the purchase of the articles and things authorised by the Act) are to be paid out of the library rate. This rate is to be levied and recovered, in a burgh, in the same manner as the burgh general assessment, and, in a parish, as the poor rate [2] (s. 7). The amount of the library rate is not to exceed threepence [3] per pound (s. 8). Neighbouring burghs and parishes which have adopted the 1887 Act may combine for any period in carrying the Act into execution, and may share the expenses of so doing as may be agreed between them.[4]

Subsection (5).—*Audit of Accounts.*

339. The accounts of the committee appointed under the Act are to be audited as part of the accounts of the rating authority, or, in the case of a combination of burghs or parishes, as part of the accounts of the rating authority making the largest contribution to the expenses of the committee.[3] The magistrates and council of a burgh, or the parish council, are to provide and keep books in which are to be entered true and regular accounts of receipts, payments, and liabilities with reference to the execution of the Act. These books are to be open to the inspection of every person liable to be assessed for the library rate. The accounts must be annually audited and an abstract printed and inserted in one or more newspapers published or circulated in the burgh or parish (s. 9).

Subsection (6).—*Powers of Authorities.*

340. The authority under the Act may appropriate, for the purposes of the Act, any lands or buildings vested in them, and may, out of the library rate (or out of money borrowed as provided for in the Act), purchase, feu, or rent any land or buildings, and erect thereon any building suitable for public libraries, public museums, schools for science, art galleries, and schools for art. They may also alter or extend any buildings for such purposes, repair and improve them, and fit up, furnish, and supply them with all requisite furniture, fittings, and conveniences (s. 10). The Lands Clauses Consolidation (Scotland) Act, 1845 [1] (with respect to purchase of land by agreement and purchase money or compensation coming to parties having limited interests, or prevented from treating or not making title), is incorporated with the Act, as are also provisions as to conveyances of land. The authority may sell or exchange lands, buildings, or other property vested in them for the purposes of the Act. The money arising from such sales, and the property received in exchange, are to be applied and held for the purposes of the Act (s. 12).

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[1] See next para.

[2] See 8 & 9 Vict. c. 83.

[3] Public Libraries (Scotland) Act, 1920, c. 45, s. 1 (1).

[4] 62 Vict. c. 5.

341. The authority may borrow (at interest on mortgage or bond on the security of the rate to be levied under the Act) a sum not exceeding the capital sum represented by one-fourth part of the library rate capitalised at the rate of twenty years' purchase. On repayment of such sum or part thereof they may reborrow, so long as the whole sum borrowed does not at any one time exceed the amount of the capital sum (as set forth above) after deduction of any sums set apart as a sinking fund (s. 14). The sinking fund must be an annual sum equal to at least one-fiftieth of the borrowed money.

SUBSECTION (7).—*Appointment of Committee.*

342. The authority must, within one month after the adoption of the Act (and thereafter yearly), appoint a committee of not less than ten or more than twenty members, half to be chosen from amongst the magistrates and council or parish council, and half from the householders. Three members of the committee form a quorum, and the appointment of the committee is to take place, in burghs, at the first meeting after the annual election of town councillors or commissioners of police, and, in parishes, at the first meeting after the annual meeting for the election of representative members of the parish council (s. 18). Provision is made for dealing with the resignation or death of members of committee and appointment of new members (s. 19). The committee is to meet every three months in the case of a burgh, or oftener if necessary, and in the case of a parish as often as may be necessary, and rules as to conduct of meetings are laid down (s. 20). Where neighbouring burghs or parishes by agreement combine for the purpose of carrying the Act into execution, the committee is to be appointed by each burgh or parish in such proportion as may be provided by the agreement.[2]

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[1] 8 & 9 Vict. c. 19.

[2] Public Libraries (Scotland) Act, 1899 (62 Vict. c. 5), s. 2.

Subsection (8).—*Powers of Committees.*

(i) *General Powers.*

343. The committee is to manage, regulate, and control all libraries and museums established under the Act or to which it applies, and has all the necessary powers of management, including the following powers: (1) to appoint sub-committees; (2) to appoint a salaried clerk, salaried librarians, officers, and servants, to pay and to dismiss them; (3) to purchase books, newspapers, reviews, magazines, and other periodicals, statuary, pictures, engravings, maps, specimens of art and science, and other articles necessary for the establishment, increase, and use of the libraries and museums under their control, and to do all things necessary to keep the same in a proper state of preservation and repair; (4) to sell or exchange any books, works of art, or other property of which there may be duplicates, provided that the money arising from such sale and the property received in exchange is to be applied and held for the purposes of the Act; (5) to provide suitable rooms in the libraries for reading; (6) to lend out books for reading by the householders and inhabitants of the burgh or parish, and to grant the same privilege to the inmates of industrial schools, training ships, reformatories, barracks (or other similar institutions established for or in the burgh or parish), or to any person carrying on business within the burgh or parish, or to any employee, although the person or employee may not be a householder and may not reside within the burgh or parish; (7) to compile and print catalogues, including reports of their proceedings, and to sell the same, the proceeds to be applied for the purposes of the Act (s. 21).

(ii) *Power to make By-laws.*

344. The committee may make by-laws for regulating anything connected with the control, management, protection, and use of any property, articles, or things under their control for the purposes of the Act, and may impose penalties for the breach of these by-laws. The by-laws, before being acted on, must be signed by a quorum of the committee, and (save as regards officers and servants of the committee) must be approved by the authority, and also by the sheriff and confirmed by him. Notice must be given in one or more local newspapers one month at least before the hearing of the application for confirmation. Any party aggrieved by the by-laws, or by alterations thereof, may (on giving notice of the nature of his objection ten days before the hearing) be heard thereon, by himself or his counsel, attorney, or agent. Not more than one party may be heard upon the same matter of objection (s. 23). For one month at least before application for confirmation of the by-laws or alterations thereof, a copy of the by-laws is to be kept at the office of the clerk to the committee, and also put up in some conspicuous place in each of the libraries and museums, and all persons may, at all reasonable times, inspect such copy without fee or reward.

The clerk to the committee must furnish every person who applies with a copy on payment of sixpence for every hundred words to be copied (s. 24). The clerk to the committee must give, without charge, a printed copy of the confirmed by-laws to every person who applies, and a copy thereof must be printed or placed on boards and put up in some conspicuous part of each of the libraries and museums, and these copies are to be open to inspection without charge (s. 25). The production of a written or printed copy of the by-laws (1) requiring confirmation, authenticated by the signature of the sheriff who confirmed them, and (2) not requiring confirmation, authenticated by the common seal of the committee and signed by the chairman of the committee, is to be evidence of the existence and making of such by-laws in all cases for prosecution under the same, without proof of the signature of the sheriff, or the common seal of the committee, or the signature of their chairman. With respect to the proof of publication of the by-laws it is sufficient to prove that a board, containing a copy thereof, was put up and continued as the Act directs (s. 27).

(iii) *Recovery of Penalties and Forfeitures.*

345. All penalties and forfeitures exigible under the Act or under any incorporated Act or any by-law may be recovered by an ordinary small debt action, in the name of the clerk to the committee, before either the sheriff or justices of the district. In any prosecution under the Act an excerpt from the books of the committee, certified by the clerk or other proper officer, is to be held as equivalent to the books of the committee, and all entries in the books of the committee bearing that any book or books mentioned or referred to therein has or have been borrowed by the person complained against are to be taken and received as evidence of the fact, and the *onus probandi* is thrown on the party complained against, and if decree passes against him, he is to be found liable in costs (s. 28). The authority have power to recover the value of articles or things damaged or the amount of the damage sustained against all parties liable for the same (s. 22). All actions at the instance of the committee are to be brought in name of the clerk, and in all actions against the committee it is sufficient to call the clerk as defender, and service on him is sufficient service. All actions brought by or against the clerk in his official character are to be continued by or against his successors in office without any action of transference (s. 29).

(iv) *Estimates.*

346. The committee must, in April each year, make up an estimate of the sums required (1) to defray the interest of any money borrowed, the payment of the sinking fund, and the expense of maintaining and managing all libraries or museums under their control for the year after Whitsunday next to come; (2) for the purpose of purchasing the books, articles, and things authorised by the Act for such libraries and museums.

The committee is to report the estimate to the authority, who are to provide the amount required out of the library rate to be levied by them and to pay it over to the committee (s. 30). The Public Libraries (Scotland) Act, 1920,[1] further provides that the committee may, before such date in the current financial year as may be fixed by the authority, make a supplementary estimate of the sums required for the above-mentioned purposes, and on the estimate being reported to the authority, the authority are to act upon it as if it were an estimate reported under s. 30 of the 1887 Act.

347. Where any of the following institutions, viz. a public library, a public museum, a school for science and art, a school for science, a school for art or an art gallery, has been established under any Public Library Act, there may, at any time, be established in connection therewith any other of the above-mentioned institutions without further proceedings being taken for the adoption of the Act (s. 31). All libraries, museums, or art galleries established under the Act, or to which it applies, are to be open to the public free of charge, and no charges are to be made for the use of books or magazines issued for home reading (s. 32).

SECTION 3.—EXEMPTION FROM DUTIES UNDER INCOME TAX ACTS.

348. The Income Tax Act, 1918,[2] exempts from duties under Schedule A any building which is the property of any library or scientific institution, used solely for the purposes of that institution, in which no payment is made or demanded for any instruction there afforded by lectures or otherwise, and so far as not occupied by any officers of the institution, nor by any person paying rent for the same. The above allowance is to be granted by the general commissioners for the division (Schedule A, No. V. Rules 1 (*c*), 2). This provision re-enacts a similar provision in the Income Tax Act, 1842,[3] which has been the subject of decision both in England and Scotland. In an English case it was held by the House of Lords that a free public library established under the Public Libraries Acts is a "literary institution" within the meaning of the 1842 Act, and that the building in which such library is placed is entitled to the exemption.[4] In that case Lord Herschell remarked that the essential idea conveyed by a literary and scientific institution "is often no more than a system, scheme, or arrangement by which literature or science is promoted without reference to the persons with whom the management may rest, or in whom the property appropriated for these purposes may be vested."[5] The "property of" such an institution means "property appropriated to, and applied for, its purposes."[6] In a Scottish case[7] the buildings of a free public library, in one of the rooms of which accommodation was afforded for the books belonging to a subscription library, under an arrangement by which, after they had been a year in circulation, the books became the property of the free library, were held not to be within the exemption, in respect that the buildings were not being used solely for the purposes of the free library. The Juridical Society of Edinburgh claimed exemption in respect of premises which it owned and occupied as a library and debating hall on the ground that the society was a "literary or scientific institution," but it was held that the society was not exempt as its main objects were professional.[1]

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[1] 10 & 11 Geo. V. c. 45.

[2] 8 & 9 Geo. V. c. 40.

[3] 5 & 6 Vict. c. 35, s. 61, Rule 6.

[4] *Mayor of Manchester* v. *M'Adam*, [1896] A.C. 500.

[5] At p. 507.

[6] At p. 508.

[7] *Musgrave* v. *Mags. of Dundee*, 1897, 24 R. 930.

SECTION 4.—EXEMPTION FROM CORPORATION DUTY.

349. The Customs and Inland Revenue Act, 1885,[2] exempts from corporation duty property which, or the income and profits whereof, is legally appropriated and applied for, *inter alia*, the promotion of education, literature, science, or the fine arts (s. 11 (3)). In the case of the *Society of Writers to the Signet* v. *The Commissioners of Inland Revenue*[3] it was held that the property of the society was not exempt from corporation duty, and that the meaning of the clause of exemption is that the property or income is to be, if not exclusively, yet certainly in the main and as its chief object, devoted to the promotion of education, literature, science, or the fine arts.[4] On the other hand, it was held, in England, that property belonging to the Institution of Civil Engineers was exempt by reason of being appropriated and applied substantially for the promotion of mechanical and engineering science, and not for professional interests.[5]

SECTION 5.—EXEMPTION FROM LOCAL RATES.

350. The Scientific Societies Act, 1843,[6] exempts from all local rates —either as owner or tenant—societies instituted for purposes of science, literature, or the fine arts exclusively, provided that the society is supported wholly or in part by annual voluntary subscriptions, does not make any dividend, gift, division, or bonus in money among its members, and obtains a certificate from the Registrar of Friendly Societies (ss. 1, 2). It has been held that there is no exemption for a society established for educating the children of the labouring classes,[7] or for training members for a particular profession,[8] or where the society's funds may be applied to purposes other than science, literature, etc.[9] "Voluntary contributions" means payments which are gratuitous and without consideration, and where no advantage is obtained for the money paid,[1] and not where the society provides special privileges for members who contribute.[2] There must be an express rule prohibiting the making of any dividend.[3] It has been held that a free public library—established by a municipal corporation under local Acts—was not exempt from local rates, even though a certificate had been obtained from the Registrar of Friendly Societies, in respect that it was not wholly or in part supported by annual voluntary subscriptions.[4]

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[1] *Farmer* v. *Juridical Society of Edinburgh*, 1914 S.C. 731.

[2] 48 & 49 Vict. c. 51.

[3] 1886, 14 R. 34.

[4] Per Lord President Inglis at p. 38.

[5] *Commrs. of Inland Revenue* v. *Forrest*, 1890, 15 App. Cas. 334. See also *In re Royal College of Surgeons of England*, [1899] 1 Q.B. 871.

[6] 6 & 7 Vict. c. 36.

[7] *R.* v. *Pocock*, 1846, 15 L.J. M.C. 132.

[8] *R.* v. *Institution of Civil Engineers*, 1879, 5 Q.B.D. 48.

[9] *R.* v. *St. Martin-in-the-Fields Overseers*, 1852, 21 L.J. M.C. 53.

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[1] *Savoy Overseers* v. *Art Union of London*, [1896] A.C. 296.

[2] *R.* v. *Zoological Society*, 1854, 23 L.J. M.C. 139.

[3] *R.* v. *Jones*, 1846, 15 L.J. M.C. 129.

[4] *Liverpool Corporation* v. *West Derby Union*, 1905, 92 L.T. 467.

LICENSING LAWS.

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Section 1.—Introductory.[1]

351. The object of the Licensing Acts is the regulation of the retail and sale of exciseable liquor. No person may retail or sell exciseable liquor unless he holds a certificate issued by the competent authority authorising him to do so. The Home Drummond Act, 1828,[2] was the foundation of the jurisdiction of authorities competent to issue the requisite certificate. By that Act a form of certificate was prescribed, and it contained certain conditions the non-observance of which was punishable by fine or imprisonment, or by forfeiture of the certificate, or by both. Penalties were also imposed for selling without a certificate.

352. A considerable body of legislation followed the 1828 Act, the general effect of which was to restrict the right to sell exciseable liquor and to impose penalties for contraventions. The number and character of the statutes so passed rendered a consolidating Act necessary, and in 1903 the Licensing (Scotland) Act[3] was passed. This Act was, however, more than a consolidating Act, as it made sweeping alterations in the existing law and added many more restrictions on the sale of exciseable liquor. Despite these changes, however, it remains true that the cardinal principles of licensing as laid down in the 1828 Act still remain. The right to sell or retail exciseable liquor still depends on a certificate issued by the competent licensing authority. The 1903 Act also dealt with the registration of clubs;[4] and in addition contained a number of provisions which fall more properly under the subject of Excise.[5]

353. Further legislation has followed the 1903 Act. The most important subsequent Act is the Temperance (Scotland) Act, 1913,[6] which not only made considerable amendments on the 1903 Act but introduced the principle of Local Option, by which restrictions may be placed by the community on the powers of the licensing authorities. This latter portion of the Act came into operation in 1920, and its effect has been that in certain voting areas the electorate has exercised the power given to it of controlling the number of retail licensed premises permissible in the area. During the War a considerable body of emergency legislation was passed, but most of it was repealed by the Licensing Act, 1921.[1] The Act did, however, perpetuate a certain amount of war-time legislation which therefore became part of our permanent licensing law. The Intoxicating Liquor (Sale to Persons under Eighteen) Act, 1923,[2] made more stringent the restrictions on the sale of liquor to young persons. Attention is also directed to the Finance Act, 1910,[3] and the Finance Act, 1917,[4] which deal with licence duty. See EXCISE.

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[1] Purves, Scottish Licensing Laws, 4th ed., *vide* Introduction.

[2] 9 Geo. IV. c. 28.

[3] 3 Edw. VII. c. 25.

[4] See Vol. III. p. 410, *ante*.

[5] See Vol. VI. p. 452, *ante*.

[6] 3 & 4 Geo. V. c. 33.

SECTION 2.—LICENSING AND APPEAL COURTS.

SUBSECTION (1).—*Judicial Character of Licensing Courts.*

354. The 1903 Act[5] provides that for the purpose of granting certificates under the Act there shall annually be held throughout Scotland two general half-yearly meetings of the Licensing Courts, the constitution of which is provided for in the Act.[6] While the Licensing Courts so set up are not Courts in the full sense of the term, they do possess some of the powers and functions of a proper judicial Court. The 1903 Act was the first Act to give them the title of Courts, and it seems clearly the intention of the Act to give them a judicial character. Thus definite rules of procedure are laid down, to which objectors must adhere. So, too, power is given to summon witnesses, to enforce their attendance, and to examine them on oath.[7] They may grant diligence to recover documents and have power to imprison witnesses who disobey the citation or prevaricate.[7] They also may find objectors to applications for renewals liable in expenses, but they may not grant a decree on which execution can pass.[8]

355. Nevertheless, it has been pointed out by the House of Lords that, despite the fact that they are designated Courts, their duty is in the main administrative.[9] It follows that their discretionary power and character remains. So they may act on their own knowledge or on the report of an official; they may visit a *locus*;[10] and on the application for a new certificate they may proceed on the report of one member of the Court.[10] While possessing this administrative discretion they must, of course, conduct their business in a judicial way and according to the rules of judicial fairness.[11]

SUBSECTION (2).—*Constitution of Licensing Courts.*

356. The 1903 Act provides for the constitution of Licensing Courts. A distinction is drawn between Burgh Licensing Courts[12] and County

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[1] 11 & 12 Geo. V. c. 42.
[2] 13 & 14 Geo. V. c. 28.
[3] 10 Edw. VII. c. 8.
[4] 7 & 8 Geo. V. c. 31.
[5] Sec. 1.
[6] See para. 357, *infra*.
[7] Sec. 21.
[8] Sec. 19.
[9] *Walsh* v. *Mags. of Pollokshaws*, 1907 S.C. (H.L.) 1.
[10] Sec. 14.
[11] *Goodall* v. *Bilsland*, 1909 S.C. 1180; *Black* v. *Anderson*, 1899, 7 S.L.T. 302; *Sharp* v. *Wakefield*, [1891] A.C. 173.
[12] Sec. 2.

Licensing Courts.[1] Provision is also made for the constitution of Courts of Appeal.[2]

(i) *Burgh Licensing Courts.*

357. The statute provides that for each burgh being a county of a city, and for each royal, parliamentary, or police burgh containing a population of or exceeding 7000, and for each burgh containing a population under 7000 but of or exceeding 4000, the magistrates of which have power to grant certificates under the existing Acts, there is to be a separate Licensing Court, consisting of the magistrates of such burgh for the time being.[3] Population is accordingly made the test of whether or not a town is entitled to have a Licensing Court. The population must be contained within the police boundary of the burgh.[4] Population has a defined meaning in s. 10 (2) as the population according to the last census taken. Certain burghs are grouped together and deemed to form one burgh.[5]

(ii) *County Licensing Courts.*

358. The County Council of every county is to determine in its discretion whether the county shall be divided into districts for the purposes of the Act (called licensing districts). Where these districts are not local government districts, the consent of the Secretary of State for Scotland is required. The administrative areas under the Local Government Act are adopted to prevent multiplication of such areas, although county councils may refuse to divide the county at all. Burghs which are not entitled to separate Licensing Courts form part of the county and of the local government or licensing district, if any, within which they are situated. For each county, or, where a county is divided into licensing districts, for each licensing district, there is a separate Licensing Court. One-half of the members of this Court are elected by the justices of the peace for the county from their own number, and one-half by the county council from their own number. The number of members of the Court is in accordance with this scale of population, viz.: Population under 25,000, eight members; between 25,000 and 50,000, twelve members; between 50,000 and 100,000, fourteen members; 100,000 or over, eighteen members.[6] Where, however, a burgh, the magistrates of which had power to grant certificates under the earlier Acts, forms part of a county or licensing district under the Act, the Licensing Court for the county or district is modified by the addition thereto of such number of members for every such burgh as the Secretary of State for Scotland determines by order under his hand, so that one member at least is added for every such burgh, and that the number of members for each burgh, as nearly as may be, bears the same proportion to the number of the Court without such addition as the population of the burgh bears to that of the county or district, "excluding every such burgh." [7] The added members must be magistrates of the respective burghs, and the total number of members for a burgh must not exceed the number of its magistrates.[1]

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[1] Sec. 3.
[2] Sec. 4.
[3] Sec. 2.
[4] Sec. 10 (1) (*e*).
[5] Sec. 10 (1) (*c*) (*d*).
[6] Sec. 3 and Schedule I.
[7] Sec. 3 (4).

(iii) *Courts of Appeal.*

359. For the purpose of hearing appeals and applications for confirmation of new certificates under the Act, a Court of Appeal is constituted, one-half of the members of which are elected by the justices of the peace from their own number, and one-half are burgh magistrates or county councillors respectively. The Court of Appeal from a Burgh Licensing Court[2] is for each burgh, being a county of a city, a separate Court consisting of the members of the Licensing Court and of an equal number of justices of the peace for the county of a city; and for each royal, parliamentary, or police burgh (not being a county of a city) containing a population of or exceeding 20,000, a separate Court consisting of the members of the Licensing Court and of an equal number of justices of the peace for the county within which the burgh is situate; and in each county, for all the royal, parliamentary, and police burghs situate therein containing a population of or exceeding 7000 and under 20,000, one and the same Court, consisting of burgh magistrates and justices of the peace for the county.[3] The Court of Appeal from a County Licensing Court,[4] or if the county is divided into licensing districts from the several District Licensing Courts, and from any Burgh Licensing Court for a burgh situate within the county, is for each county one and the same Court, whereof one-half of the members are county councillors for the county elected as provided[5] and one-half justices of the peace for the county; and the number of members must be such that the Court contains three more county councillors and three more justices of the peace than the County Licensing Court or the Licensing Court for the most populous licensing district within the county.

SUBSECTION (3).—*Election of Members and Term of Office.*

360. Membership of Licensing Courts and of Courts of Appeal rests on three classes of individuals, viz. burgh magistrates, justices of the peace, and county councillors. With regard to justices the statute directs that an election shall take place at a meeting of justices of the peace to be held on the third Tuesday of December every third year after 1904. Every such meeting is held at the same place as the general meeting of the county council on that day. County councillors are elected on the same day at this county council meeting. The duration of the term of office of a justice of the peace or county councillor elected to a Licensing Court is therefore three years.[5] In Burgh Courts proper the members are the magistrates of the burgh for the time being.[6]

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[1] Sec. 3 (4).

[2] Sec. 4 (2).

[3] The number of magistrates from each burgh is regulated by S.R. & O. 1923, No. 266, S. 29.

[4] Sec. 4 and Third Schedule.

[5] Sec. 5 (1).

[6] Sec. 2.

361. The members of a County or District Licensing Court being magistrates of a burgh, and the members of a Court of Appeal from a Burgh Licensing Court being magistrates of a burgh containing a population under 20,000, are, where necessary, elected by the magistrates of the burgh in each case at a meeting to be summoned by the town clerk, and to be held on any day within fourteen days after the annual election of town councillors in the year 1903, and in subsequent years as vacancies occur. The provost, or in his absence the senior bailie present, is chairman of such meeting. Each magistrate being a member of a County or District Licensing Court or of a Court of Appeal from a Burgh Licensing Court holds office so long as he remains a magistrate of the burgh.[1] Retiring members of a Licensing Court or a Court of Appeal are eligible for re-election, and it is no disqualification for a burgh magistrate or county councillor to be made a justice of the peace or *vice versa*.[2]

362. If a Licensing Court or a Court of Appeal is not elected at the time at which it ought to be elected, or an insufficient number of members is elected for such Court, the Secretary of State for Scotland shall, by order, provide for the holding of a fresh election.[3] Where in a burgh any magistrate is disqualified from acting as a member of a Licensing Court or Court of Appeal, and no other magistrate is available, the town council may elect a councillor to act for such magistrate whilst his disqualification continues.[4]

SUBSECTION (4).—*Meetings of Licensing Courts.*

363. Burgh Licensing Courts meet upon the second Tuesday of April and the third Tuesday of October in each year. County or District Licensing Courts meet on the third Tuesday of April and the last Tuesday of October in each year. The Court may be adjourned from time to time during the period of one month next after the day of their first meeting, but no longer.[5] There is no provision for the intimating of adjourned meetings, but it is desirable that the date of the adjourned meeting should be published.[6] One-half of the members (and in no case less than two members) must be present at a meeting to constitute a quorum.[7] In the absence of a quorum the chairman, or in his absence the clerk, may call a further meeting in lieu of the abortive meeting.[8] A Court of Appeal has power to make regulations with respect to its meetings and the transaction of business, provided that, where appeals or applications for confirmation have been timeously lodged, it must meet to deal with them within one month of the general half-yearly meeting of the Licensing Court or any adjournment of it.[9]

364. A chairman is elected annually. Until a chairman is elected, and in the case of his absence from a meeting, the members present elect one of their own number to the chair,[1] but this provision applies only to casual vacancies arising in the course of a term of office.[2] When an election of a chairman takes place, and an equal number of votes is given for two or more persons, the meeting must determine by lot which of these persons is to be chairman.[3] A chairman has a casting vote in all cases except an election of a chairman [3] and on an application for a new certificate, which can be granted only by a majority of the members of the Court present and voting.[4]

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[1] Sec. 5 (2).
[2] Sec. 5 (3).
[3] Sec. 5 (4).
[4] Sec. 5 (5).
[5] Sec. 6.
[6] Purves, p. 16.
[7] Sec. 5 (9).
[8] Temperance (Scotland) Act, 1913, s. 9.
[9] Sec. 8 (2).

365. Provided a quorum is present, the Court may act notwithstanding any vacancy caused by insufficient election or otherwise. Where a statutory meeting of a Licensing Court could not be held through failure to obtain a quorum, the Court of Session, in virtue of its *nobile officium*, appointed a fresh meeting to take place.[5] Decisions of the Court are reached by a majority of the members present and voting. It is not, however, competent for members to take part in a decision if they have heard only a part of the evidence, and it does not validate the decision to deduct the votes of those members who have heard only part of the evidence.[6]

366. Casual vacancies may be filled by the election of a duly qualified person at the first meeting following upon the occurrence of the vacancy. The person so elected holds office till the next ordinary meeting for elections.[7]

SUBSECTION (5).—*Disqualifications for Membership.*

367. Disqualification for membership of the Licensing Courts arises from three sources: first, the Licensing Acts themselves; secondly, other statutes; thirdly, the common law.

368. Under the 1903 Act,[8] the general ground of disqualification is interest in the liquor traffic, and accordingly those dealing in exciseable liquors are expressly debarred from membership. A more particular disqualification is that no member shall act in the granting of a certificate when he is proprietor or tenant of the premises for which the certificate is asked, but this disqualification does not apply to refusal or to the granting of certificates to other premises. The general ground of disqualification is applied also to partners of those dealing in exciseable liquor, but it is thought a shareholder in a limited company carrying on the business of brewers is not disqualified.[9] The trustee on the sequestrated estate of a licence-holder is not disqualified.[10] Those interested in railway companies which are retailers of exciseable liquor are excepted from the disqualification.[11]

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[1] Sec. 5 (7).

[2] *Brown* v. *Cameron*, 1910, 1 S.L.T. 181; Purves, p. 15.

[3] Sec. 5 (8).

[4] Sec. 5 (11).

[5] *Buchanan, Petr.*, 1910 S.C. 685.

[6] *Goodall* v. *Bilsland*, 1909 S.C. 1152; see especially per Lord Pres. Dunedin at p. 1180.

[7] Sec. 5 (6); *Brown* v. *Cameron*, 1910, 1 S.L.T. 181.

[8] Sec. 9.

[9] Purves, p. 23.

[10] *Lundie* v. *Mags. of Falkirk*, 1890, 18 R. 60.

[11] Sec. 9 (1).

369. As regards disqualifications arising from other statutes, it follows from the fact that a person whose estate has been sequestrated is disqualified from being a justice of the peace or a town or county councillor that such a person is disqualified from membership of a Licensing Court.[1] A justice who is a trader holding an Excise licence may not act in any case relating to his trade or business or in any case in which he is concerned or interested as a trader.[2] Connection with the Inland Revenue disqualifies a justice from acting in any matter relating to the Revenue.[3]

370. At common law certain forms of interest may disqualify. The principle applied is that of *auctor in rem suam*. Members of the Court must have unbiassed and impartial minds.[4] So the paid secretary of a society which was actively opposing the granting of particular licences was interdicted from sitting on the Court which was to consider whether the licences should be granted.[5] But membership of temperance societies or societies for the purpose of opposing the granting of licences is not *per se* enough to disqualify[6] unless perhaps where the member is pledged to vote against the granting of any licence which may come before him.[7] A member of a Licensing Court may not sign a requisition for a poll under the 1913 Act.[8]

SECTION 3.—THE CERTIFICATE.

SUBSECTION (1).—*General.*

371. As already explained, the right to retail liquor depends on the possession of a certificate granted by the proper licensing authority. There are three main forms of certificate:[9] one for inns and hotels, one for public houses, and one for dealers in exciseable liquors and grocers and provision dealers trading in exciseable liquors. Where a Licensing Court deems it inexpedient to grant to any person a certificate in the form applied for, it may grant one in any of the other forms.[10] Licensing Courts are empowered to grant authority to sell spirits, wine, and all other exciseable liquors narrated in the certificates, or to restrict the sale (1) to porter, ale, beer, cider, or perry, or (2) to wine, porter, ale, beer, cider, or perry.[11] The forms prescribed by the Sixth Schedule of the 1903 Act have now been altered by the Licensing (Scotland) (Adaptation of Forms) Order, 1921,[12] made by the Secretary of State for Scotland under the Licensing Act, 1921.[13]

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[1] Purves, p. 12.

[2] 7 & 8 Geo. IV. c. 53, s. 68; *M'Intosh* v. *Waite*, 1891, 18 R. 582.

[3] 7 & 8 Geo. IV. c. 53, s. 68.

[4] *Black* v. *Anderson*, 1899, 7 S.L.T. 299; *Owet* v. *Crichton*, 1902, 10 S.L.T. 271.

[5] *Goodall* v. *Bilsland*, 1909 S.C. 1152, at p. 1177; *M'Geehen* v. *Knox*, 1913 S.C. 688, at p. 694.

[6] *Goodall* v. *Bilsland*, *supra*; *M'Geehen* v. *Knox*, *supra*.

[7] *M'Geehen* v. *Knox*, *supra*, at p. 696.

[8] Purves, p. 13.

[9] Sixth Schedule.

[10] Sec. 35; but see Purves, p. 75; *Quinn* v. *Mags. of Paisley*, 1909 S.C. 1085; *Weir* v. *Bryce*, 1897, 24 R. (J.) 42.

[11] Secs. 34 and 35, and Sixth Schedule; *Baillie* v. *Wilson*, 1917 S.C. 55; Purves, p. 82.

[12] S.R. & O., 1921, 1600, S. 83; see Purves, p. 458.

[13] Sec. 21 (1) (i).

372. The 1921 Act fixed certain limits of time within which the sale or supply of liquor might be permitted. The Licensing Courts were given power, within these statutory limits, to regulate the time within which the sale or supply of liquor might be permitted.[1] In the case of hotels, restaurants, and clubs the Licensing Court may, if it thinks proper, extend the permitted hours by one hour, so as to allow the sale and supply of drink for consumption at a meal. In order to obtain the extension the licence-holder must apply to the Court.[2] Provision is made by rules issued under the 1921 Act for regulating the procedure.[3]

373. Licensing Courts have a power of making by-laws which have the effect of circumscribing the force of certificates.[4] The Courts have also a power of giving special permission for sale of liquor for public and special entertainments.[5] A certificate to keep an inn and hotel or public-house or to sell by retail is confined to one house and premises.[6] So where certificated premises were burnt to the ground and the holder of the licence continued to carry on business within the walls, he was held to be within the statutory provision.[7] Licensees may sell at any lawful fair in houses, booths, or other places in the same parish as the house and premises, or in any parish immediately adjoining thereto.[8] A certificate for the sale by retail of spirits or wine includes authority to sell by retail porter, ale, beer, cider, and perry, and the holder can demand a licence for such purposes.[9] Any certificate granted contrary to the provisions of the Act is null and void.[10]

Subsection (2).—*Inn and Hotel-keeper's Certificate.*

(i) *Ordinary Certificate.*

374. The certificate of an inn or hotel-keeper also contains the following conditions, viz. that the holder do not fraudulently adulterate or sell commodities, knowing them to have been fraudulently adulterated; do not sell any groceries or other uncooked provisions in the premises, to be consumed elsewhere; do not knowingly permit any breach of the peace, drunkenness, or riotous or disorderly conduct within the premises, and do not himself be in a state of intoxication on the premises; do not knowingly permit or suffer men or women of notoriously bad fame, or girls or boys, to assemble and meet therein; do not supply exciseable liquors to girls or boys apparently under fourteen years of age, or to persons who are in a state of intoxication; do not permit or suffer any unlawful games therein; do not, except during the permitted hours, either by himself or by any servant or agent, sell or supply to any person any exciseable liquor to be consumed either on or off the premises save as allowed by law; do not open his house for the sale of any exciseable liquors, or permit or suffer any drinking therein or on the premises belonging thereto, or sell or give out the same, on Sunday, except for the accommodation of lodgers and travellers; do maintain good order and rule within his house and premises; and lastly, do not transgress or commit any breach of the conditions of any permission to sell on a public or special occasion within his own house or elsewhere. The expression "inn and hotel" means in towns and the suburbs thereof a house containing at least four apartments set apart exclusively for the sleeping accommodation of travellers; and in rural districts and populous places not exceeding one thousand inhabitants according to the census last before taken, a house containing at least two such apartments.[1]

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[1] 1921 Act, ss. 1–3.

[2] 1921 Act, s. 3.

[3] Licensing (Scotland) Rules, 1921, para. 5 (S.R.O., 1921, No. $\frac{1512}{\text{s. } 77}$; See Purves, pp. 423 and 454.

[4] See para. 379, *infra*.

[5] See para. 378, *infra*.

[6] Sec. 36.

[7] *Craig* v. *Peebles*, 1875, 2 R (J.) 30.

[8] *Lamb* v. *Brown*, 1894, 21 R. (J.) 35; see Purves, p. 81.

[9] Sec. 37.

[10] Sec. 39; see Purves, p. 84.

(ii) *Six-day and Early Closing Certificates.*

375. If the applicant at the time of his application, or even at the moment when the Court is disposing of the application,[2] applies to the Court to insert in his certificate a condition that he shall keep the premises closed during the whole of Sunday, the words "and travellers" are omitted from such certificate. The applicant is still entitled to supply lodgers in the inn and hotel. Similarly, an applicant can get his certificate modified so as to close one hour earlier at night than such premises would otherwise have to be closed.[3] A modified certificate can only be lawfully granted on the application of the licensee.[4] The holder of an inn and hotel certificate or of an early closing certificate only pays six-sevenths of the full duty where the hotel is closed on Sunday or the premises are early closing; and if he holds not only a six-day certificate but also an early closing one, he is allowed a remission of two-sevenths of the duty.[5]

SUBSECTION (3).—*Public-house Certificate.*

376. The public-house certificate, in addition to the conditions contained in the hotel-keeper's certificate, contains the following, viz.: that the holder do not receive or take in as the price or for the supply of exciseable liquors any wearing apparel, goods, or chattels. As regards the prohibition against permitting men or women of notoriously bad fame to assemble, the word "knowingly" which appears in the hotel-keeper's certificate is omitted from that of the publican. The clause as to travellers is also omitted.

SUBSECTION (4).—*Grocer's Certificate.*

377. The dealer or grocer's certificate prohibits him from trafficking or giving exciseable liquors to be drunk or consumed on his licensed premises. It contains nearly all the conditions to be found in the publican's certificate. The grocer or dealer is prohibited from opening his premises for business on Sunday, and from selling or giving out therefrom on that day any liquors, goods, or commodities. Grocers can keep their shops open for the sale of other commodities than exciseable liquors at all times, Sunday excepted.

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[1] 25 & 26 Vict. c. 35, s. 37. [2] *Quinn* v. *Mags. of Paisley*, 1909 S.C. 1085. [3] Sec. 38.
[4] *R.* v. *Kirkdale Justices*, 1886, 18 Q.B.D. 248; *R.* v. *Crewkerne Justices*, 1888, 21 Q.B.D. 85. [5] Sec. 48.

SUBSECTION (5).—*Special Permissions.*

378. Special permissions may be granted to a certificated inn and hotel-keeper or public-house keeper where there is a public or special entertainment to take place therein, or in any other place situated within the jurisdiction of the Court, during any particular time. Any two members of the Licensing Court may, if they shall think fit, and on being satisfied that such inn and hotel or public-house, place, or premises possesses the necessary accommodation, and that the entertainment is for a public or special occasion [1] of a legitimate and proper character, grant the licensee of such premises a special permission in writing (*a*) to keep them open and sell liquor therein beyond the hour prescribed by his certificate for closing, Sunday excepted; or (*b*) to open any restaurant for which a public-house certificate is held for the sale and consumption of provisions and refreshments of any kind other than exciseable liquors, and for that purpose only, before or beyond the hours prescribed by his certificate, Sunday excepted. The Licensing Court may make regulations for such special permissions. Forty-eight hours' notice of such application must be given to the chief of the police of the district, and full particulars must be given why it is made. An occasional Excise licence must also be held by the applicant.[2]

SUBSECTION (6).—*By-laws.*

379. The Licensing Court may make by-laws [3] (*a*) for closing licensed premises wholly or partially on New Year's Day, and on other days not exceeding four in any one year for special reasons; (*b*) for enforcing non-residence on licensed premises or complete separation between these and the licence-holder's dwelling-house; (*c*) for requiring all wines and spirits kept by a licensed grocer to be sold in corked or stoppered vessels; (*d*) for requiring every holder of a certificate authorising consumption of exciseable liquors on the premises to keep and from day to day renew a sufficient supply of drinking water and eatables; (*e*) for fixing procedure in applications for special permissions; (*f*) for printing lists of applications. Such by-laws must be confirmed by the Secretary of State for Scotland, who may provide for publication thereof. A breach of a by-law is to be held as a breach of a certificate, with similar liability as regards penalties and expenses. A copy of such by-laws, signed and certified by the clerk to a Licensing Court, shall be evidence of such by-laws.

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[1] *Lamb* v. *Stott*, 1899, 1 F. (J.) 91.

[2] Sec. 40.

[3] Sec. 41.

SUBSECTION (7).—*Control over Structure of Licensed Premises.*

380. In the case of a new certificate plans must be lodged with the application. No reconstruction or alteration can be made without consent of the Licensing Court, otherwise the certificate may be forfeited, or an order for restoration to the original condition made. Plans for reconstruction or alteration may be required to be lodged with the clerk. The Licensing Court, in the case of a renewal, may order alterations, subject to an appeal to the Court of Appeal, but structural alterations can only be again required after the lapse of five years from the previous alterations. Failing alterations being made, a fine not exceeding £1 per day is incurred during the default. A provisional certificate may be granted pending alterations, which ought to be declared final when they have been finished. A provisional certificate may also be granted to carry on business in temporary premises pending reconstruction. A provisional grant and confirmation thereof should be applied for and dealt with in the same manner as an ordinary application.[1] A Licensing Court cannot legally sign a minute embodying a resolution to license extended premises if and when they have been erected conform to the plans submitted.[2]

SUBSECTION (8).—*Theatre Licence.*

381. Notwithstanding anything contained in the Excise Act, 1835, which empowers the Excise to grant retail licences in respect of theatres without the production of a certificate, no licence to sell exciseable liquors in any theatre or other place of public entertainment erected after the commencement of the Act shall be granted by the Commissioners of Inland Revenue to any person who shall not produce a certificate granted in terms of the Licensing Act.[3] Where the theatre existed prior to the Act the holder of a theatre licence is entitled to an Excise licence to sell liquor by retail without first obtaining a certificate under the Licensing Act.[4] In the case of *The Temperance Halls Co-operative Building Society, Ltd.*,[5] it was held that the justices in granting a theatre licence were entitled to impose the condition that the grantees should not apply for an Excise licence without the consent of the justices. The sale of exciseable liquors in a theatre or place of public entertainment, whether erected before or after the 1903 Act, may, however, take place only on the days and within the hours permitted in public-houses in the same licensing area.[6]

SECTION 4.—PROCEDURE OF LICENSING AND APPEAL COURTS.

SUBSECTION (1).—*General.*

382. A licensee must obtain from the Court a certificate in his favour in one or other of the forms already mentioned.[7] Certificates are granted at the statutory meetings of the Court.[1] Certificates are dated from 28th May or 28th November, and continue in force till the following 28th May.[2] A licensee under a certificate enduring till 28th May does not contravene it by selling on the afternoon of that day although noon of 28th May is the removal term under the Removal Terms (Scotland) Act, 1886.[3] Where premises are damaged or business suspended by accident, the certificate is suspended until business is resumed, when the certificate revives and takes effect as if granted for the then current licensing year.[4] Applications for certificates fall into three classes: applications for new certificates, for renewals, and for transfers.

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[1] Sec. 42.

[2] *Hannah* v. *Dickson*, 1894, 1 S.L.T. 453.

[3] Sec. 47.

[4] *Arthur* v. *Lord Advocate*, 1895, 22 R. 382.

[5] 1907, 15 S.L.T. 212.

[6] 1913 Act, s. 10.

[7] Para. 371, *supra*.

383. A Licensing Court is empowered to make regulations and rules as to the manner of making applications, also for ascertaining the character of the applicants, and whether a licence at the place proposed is expedient, and, in addition, as to the mode of proceeding in transferring certificates.[5] These regulations and rules ought therefore to be examined.

SUBSECTION (2).—*Applications for New Certificates.*

(i) *Method of Application.*

384. A new certificate means a certificate granted to any person in respect of any premises which are not certificated at the time of the application for such grant.[6] Where the holder of a six-day certificate applies for an unrestricted hotel certificate, he is applying for a renewal and not for a "new certificate," and it should be so described.[7] An applicant for a new certificate must fill up an application form as prescribed by the statute.[8] The application form must be truly filled up and truly answered.[9] The form to be filled up is supplied by the clerk to the Licensing Court having jurisdiction upon payment to him of a fee of sixpence per copy, and when filled up must be signed by the applicant or his agent, and lodged with the clerk fourteen clear days before the general meeting of the Licensing Court for granting and renewing certificates. This provision is imperative and no certificate can be sustained, the application for which has not been lodged timeously.[10] No application for a new certificate will be entertained until a report is made by a qualified member of such Court stating that the premises are of suitable construction and accommodation, and accompanied with a certificate as to the applicant's character and qualifications, signed by a qualified member of such Court, such report and certificate being as nearly as may be in the form prescribed in the second half of said Fourth Schedule. The Court of Appeal may review that report.[11]

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[1] Para. 363, *supra.*
[2] Sec. 12.
[3] *O'Hara* v. *Cameron*, 1921 J.C. 23.
[4] 7 & 8 Geo. V. c. 31, s. 8; Purves, p. 38.
[5] Sec. 15.
[6] Sec. 107.
[7] *Quinn* v. *Mags. of Paisley*, 1909 S.C. 1085.
[8] Sec. 14, and Fourth Schedule.
[9] *Bootland* v. *M'Farlane*, 1900, 2 F. 1014, per Lord Kyllachy.
[10] *Boag* v. *Teacher*, 1900, 2 F. 804, per Lord Trayner.
[11] Sec. 14.

(ii) *Register of Applicants.*

385. The clerk of the Licensing Court must keep a register, in which he enters separately the names and designations of new applicants, the names of persons who recommend them, the place for the proposed licence, the manner in which the application is disposed of, and a deliverance for each day saying whether such application has been granted, refused, or continued for further inquiry, which deliverance must be then and there signed by the chairman according to the form in the Fifth Schedule annexed to the Act. At an adjourned meeting anything done at a previous meeting in granting or refusing a certificate cannot be altered. Cases of new applicants must not be considered till all other cases have been disposed of.[1] The 1913 Act provides that in any case where there are more than one application for a certificate for the same premises the Court may consider the applications together.[2]

(iii) *Advertisement.*

386. Complete lists of new applications, in the form set forth in the Fifth Schedule to the Act, as also of all applications by new tenants or occupants of premises already certificated, and of all applications for renewal of certificates which have been transferred during the currency of the previous half year must be advertised twice in one or more newspapers circulating in the district; and a copy of such list must be transmitted to the registrar of every parish within the jurisdiction of the Court in so far as applicable to said parish, and any person may inspect the same on payment of a fee of one shilling, and Inland Revenue officials may inspect it free of charge.[3]

(iv) *Confirmation of New Certificates.*

387. New certificates are not valid until they have been confirmed by the Court of Appeal.[4] An application may be made for confirmation in the form, as nearly as may be, set forth in the Eighth Schedule of the Act, and must be lodged (together with the certificate) with the clerk to the Court of Appeal within ten days after the grant of the certificate. The Court of Appeal have power to award expenses to or against any party to such proceedings as they shall think just, except the procurator-fiscal for the public interest.[5] Only those persons who appear and oppose the grant of a new certificate at a Licensing Court can appear and oppose confirmation in the Appeal Court, except the Crown procurator-fiscal for the public interest.[6] All deliverances of or applications to a Court of Appeal, whether for the confirmation of new certificates or otherwise, must be entered in the register to be kept in terms of the Fifth Schedule to the Act, and if the holders of the two offices are different persons the clerk to the Licensing Court should receive intimation of all such deliverances and applications from the clerk to the Court of Appeal.[1] Where an applicant dies between the grant of the certificate and the meeting of the Court of Appeal, it appears to be incompetent to confirm the certificate in favour of another party.[2]

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[1] Sec. 16.

[2] 1913 Act, s. 9 (2).

[3] Sec. 17.

[4] Sec. 13.

[5] Sec. 28.

[6] Sec. 29; see *Stirling* v. *Dickson*, 1900, 3 F. (J.) 17.

SUBSECTION (3).—*Renewals.*

388. In the case of a renewal of a certificate, neither certificates of character nor the attendance of the holder are necessary, subject, however, to the powers of the Licensing Court to require these.[3] Where there is a refusal to renew a certificate, and an appeal is taken, and the certificate expires before the appeal is determined, the Commissioners of Inland Revenue may, by order, permit the person whose certificate is refused to carry on business during the pendency of such appeal upon such conditions as they think just.[4]

SUBSECTION (4).—*Objections to Grant or Renewal of Certificates.*

389. Any person or the agent [5] of any person owning or occupying property in the neighbourhood [6] of the house or premises proposed to be certified may object to the granting or renewal of such certificate by lodging not less than five clear days before the general meeting of the Licensing Court, with the clerk thereof, a notice in writing to that effect, signed by such person or his agent, specifying the grounds of his objection, which objection shall be heard at the then ensuing general meeting, and if such objection is proved to the satisfaction of the Court [7] the certificate shall not be granted or renewed. Such objection, however, will not be entertained unless the objector or his agent, at least five clear days before such meeting, has delivered a copy of such notice, or forwarded it by post, or left a copy thereof addressed to the applicant at his place of abode, or in the case of a renewal at the licensed premises. If the objections be considered frivolous or vexatious or unauthorised, the person or agent making them may be found liable in expenses, and a certified copy of the finding is sufficient to obtain decree therefor in the Sheriff or Justice of the Peace Small Debt Court.[8] Without any notice at all the Court may, however, hear any objections against the granting or renewing of any certificate by a member of the Court, or by the procurator-fiscal or by the chief constable or superintendent of Police.[9] It is not altogether clear what officials are comprised by these terms.[10]

SUBSECTION (5).—*Appeal as to Certificate.*

390. Any member of a Licensing Court, or the proprietor or occupier of any premises in respect of which a certificate has been applied for, or a proprietor or occupier of property in the neighbourhood of such premises who was an objector in the Licensing Court, may appeal, if dissatisfied, to the next Court of Appeal.[1] The appellant, if a qualified member of the Court, need not have been an objector at the lower Court.[2] An appealing member must lodge his objection in the prescribed way, but he need not find caution like the other appellants. An appeal must be lodged with the clerk of the Court of Appeal within ten days, and caution to abide such appeal and the expenses thereof must be found, and intimation given to the opposite party and to the Licensing Court whose decision is appealed.[3] In *Goodall* v. *Bilsland* [4] it was held that a mandate to A. to appear and object to the granting of a licence "at the forthcoming Licensing Court" applied to the Licensing Court only and not to the Court of Appeal, and that in the event of an appeal being noted without authority previously obtained, such mandate could not be ratified *quoad* third parties after the appeal had been taken. Refusal of a new certificate by the Licensing Court is final, and no appeal is competent in such a case.[5]

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[1] Sec. 30.
[2] *R.* v. *Richmond Authority*, [1921] 1 K.B. 248; Purves, p. 66.
[3] Sec. 18.
[4] Sec. 49.
[5] See *Goodall* v. *Bilsland*, 1909 S.C. 1152.
[6] Purves, p. 48.
[7] *Ibid.*, p. 50.
[8] Sec. 19.
[9] Sec. 20; *Goodall* v. *Bilsland*, *supra*.
[10] *Stirling* v. *Dickson*, 1900, 3 F. (J.) 17; *Walsh* v. *Mags. of Pollokshaws*, 1905, 7 F. 1009; *Sharp* v. *Morrison*, 1922, S.L.T. 272; Purves, p. 52.

SUBSECTION (6).—*Transfer of Certificate.*

391. A Licensing Court may at any October half-yearly meeting grant to a new tenant or occupant a transfer of any certificate then subsisting for any house or premises. If a person dies before the expiration of his certificate, or in the case of the bankruptcy, insolvency, or incapacity of the holder of the certificate, any two or more of the members of the Licensing Court within whose jurisdiction such premises are situated may grant to the executors, representatives, or disponees of the person so dying, or to the trustee, judicial factor, or *curator bonis* to such holder, a transfer of the certificate to keep and continue the same until the next general half-yearly meeting of the Licensing Court.[6] The transfer certificate must be in the form contained in the Ninth Schedule annexed to the Act, and a fee of one shilling is payable to the clerk for the certificate.[7] It is competent to appeal to the Appeal Court against the refusal of a transfer of a licence.[8] *In Hawick Heritable Investment Co.* v. *Huggan* [9] it was held that indorsation by a licensee of his certificate is not a necessary step towards a transference of the licence. A transfer of the certificate of a deceased holder should be obtained at once, otherwise the business is virtually carried on as a shebeen.[10]

SUBSECTION (7).—*Postponing Consideration of Applications.*

392. Where through inadvertence or misadventure any of the preliminary requirements of the Act have not been complied with, or where, having lodged his application, the applicant has died before the meeting of the Licensing Court, the Court may, upon such terms as it thinks proper, postpone consideration to an adjourned meeting, and if at such adjourned meeting such terms have been complied with, they may proceed to grant such certificate to the applicant, or, as the case may be, to his executors, representatives, or disponees.[1] This section seems to cover the case of a failure to apply timeously for a renewal.

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[1] Sec. 22.
[2] *Sneddon* v. *Webster*, 1854, 17 D. 72.
[3] Sec. 22.
[4] 1909 S.C. 1152.
[5] Sec. 23.
[6] Sec. 31.
[7] Sec. 32.
[8] *Sharp* v. *Morrison*, 1922, S.L.T. 272.
[9] 1902, 5 F. 75.
[10] *Brunfaut* v. *Neilson*, 1893, 20 R. (J.) 68; *Cook and Mearns* v. *Gray*, 1891, 29 S.L.R. 247.

SECTION 5.—OFFENCES.

SUBSECTION (1).—*Measures.*

393. All exciseable liquor sold by retail must, unless in cask or bottle, or in quantities less than a pint, be sold in measures marked according to the Imperial standards. Every person who acts, or suffers any person under his control or in his employment to act, in contravention of this section is liable in a penalty not exceeding £10 for the first offence and not exceeding £20 for any subsequent offence, and to forfeit the illegal measure.[2] The 1921 Act prohibits the sale or supply to any person as the measure of exciseable liquor for which he asks, of an amount exceeding that measure.[3] Licensees also come under the Weights and Measures Acts.[4]

394. These provisions are intended for the benefit of the public, to prevent fraud and to ensure that the buyer who buys by measure obtains the measure to which he is entitled. But where the buyer does not intend to buy by measure but by price these provisions do not apply. So, the use of glass vessels not of Imperial standard in supplying threepence, sixpence, or twelvepence worth of whisky, as the case may be, on demand by customers, is not illegal.[5] The distinction is thus put by Lord M'Laren in a subsequent case:[6] "The contract was for a glass of whisky, and I agree with Lord Young in thinking that there is no distinction between such a purchase and the purchase of a basin of soup or cup of tea." The same principle applies to certain measures other than Imperial which have been in use since time immemorial. So long as the parties intend to contract by means of such vessels, no offence is committed.[7]

SUBSECTION (2).—*Penalties for Breach of Certificate, etc.*

395. Holders of certificates and licences must observe the terms, provisions, and conditions contained in them, and failure to do so renders them liable in the following penalties for breaches of certificate, viz. for the first offence a sum not exceeding £5, with the expenses of conviction, and the certificate may be forfeited; for the second offence a sum not exceeding £10, with expenses of conviction, and the certificate may be forfeited;[1] and for the third offence a sum not exceeding £20, with expenses of conviction, and in this event the certificate must be forfeited,[2] the Court having no option in the matter.[3] In the event of a conviction for a first offence, then, to constitute a second offence, there must be a second conviction in any one of the three years following the first conviction; and, in like manner, it constitutes a third offence if there be a third conviction in any one of the three years following the second conviction, and notwithstanding that the second and third convictions may be for breach of a certificate on different terms and conditions than the certificate for a breach of which the previous conviction was obtained.[4] The Court may dismiss with an admonition or exercise the powers to mitigate penalties contained in the Summary Jurisdiction Acts or any other Act including the Fine or Imprisonment (Scotland and Ireland) Act, 1899.[5] The terms of the certificate shew what are the various Acts prohibited to a licensee.[6]

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[1] Sec. 33.

[2] Sec. 52.

[3] 1921 Act, s. 9.

[4] Purves, p. 129.

[5] *Craig* v. *M'Phee*, 1883, 5 Coup. 243.

[6] *Ross* v. *Johnston*, 1886, 13 R. (J.) 73; see also *Bellamy* v. *Pow*, 1896, 12 T.L.R. 527.

[7] Purves, p. 131; *Riddell* v. *Neilson*, 1903, 5 F. (J.) 57.

SUBSECTION (3).—*Breaches of Hotel Certificate.*

(i) *Adulteration.*

396. Adulteration of bread or other victuals or liquors is made an offence by hotel and public-house certificates, whereas in the grocer's certificate the only offence is the adulteration of liquors. The prosecution must prove that the licensee fraudulently adulterated the victuals or that he sold them with the knowledge that they were fraudulently adulterated.[7] Adulteration is also an offence under the Sale of Food and Drugs Acts, 1875 to 1907.[8]

397. The Licensing Act, 1921, provides[9] that, in determining whether an offence has been committed under the enactments relating to the sale of food and drugs by selling, to the prejudice of the purchaser, whisky, brandy, rum, or gin not adulterated otherwise than by any admixture of water, it is a good defence to prove that such admixture has not reduced the spirit more than 35 degrees under proof. It has been held by the English Courts that a licensee can protect himself against the operation of such a provision by exhibiting a warning notice to customers; but in *Brander* v. *Kinnear*,[10] where a licensee exhibited the following notice: "All spirits sold in this establishment are diluted. No strength guaranteed;" and in response to a demand for whisky sold spirit which was found on analysis to be more than 35 degrees under proof, it was held that in spite of the notice the sale was in contravention of s. 6 of the Sale of Food and Drugs Act, 1875, spirit more than 35 degrees under proof not being "whisky," in view of the provision of s. 10 of the 1921 Act, and that the terms of the notice were not a sufficiently clear intimation to the purchaser of the character of the article with which he was being supplied. Even where the notice is explicit, the accused must prove that the information therein was brought home to the purchaser.[1]

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[1] *M'Intyre* v. *Linton*, 1876, 3 R. (J.) 41.

[2] Sec. 53.

[3] *R.* v. *Cork Justices*, 1883, 12 L.R. Ir. 167.

[4] Sec. 54.

[5] Sec. 105.

[6] See para. 374 *et seq.*, *supra*.

[7] See *Warnock* v. *Johnstone*, 1881, 8 R. (J.) 55.

[8] 38 & 39 Vict. c. 63; 42 & 43 Vict. c. 30; 62 & 63 Vict. c. 51; 7 Edw. VII. c. 21; see Purves, pp. 260 *et seq.*; *Wilson and M'Phee* v. *Wilson*, 1903, 6 F. (J.) 10.

[9] Sec. 10, repealing s. 6 of the Sale of Food and Drugs Act, 1879.

[10] 1923 J.C. 42.

(ii) *Sale of Groceries and Uncooked Foods.*

398. The sale of groceries or other uncooked provisions to be consumed elsewhere is prohibited in both the hotel and public-house certificates, while in the grocer's certificate there is a prohibition against selling liquor for consumption on the premises. The object of these provisions is, of course, to prevent the amalgamation of two different types of business. An hotel-keeper does not require a licence to sell pies or sandwiches in a tent or field.[2]

(iii) *Breach of the Peace.*

399. Knowingly to permit a breach of the peace on the premises is an offence. The prosecution must prove that the disturbance was within the knowledge of the licensee or of his servant in the course of his employment.[3] But a master is not responsible where the servant acted in breach of specific instructions,[4] or where the act was outwith the servant's employment.[5]

(iv) *Intoxication of Licensee on Premises.*

400. The licensee himself commits an offence if he be intoxicated on the premises. Where a licensee was found drunk on his public premises after closing hours, he was convicted.[6] It is doubtful whether it is an offence to be drunk in a private part of the premises after closing hours,[7] but to be drunk in a private part during the time the premises are open may lead to a conviction.[8]

(v) *Allowing Persons of Bad Fame to Frequent Premises.*

401. It is not a condition of the grocer's certificate that he shall not permit people of bad fame to assemble, but it is a condition of the hotel certificate and the public-house certificate, with this difference, that in the former the condition reads "knowingly permit," while in the latter it is simply "permit." The essence of the offence lies not in providing persons of bad character with refreshments, but in allowing them to assemble in the premises, whether refreshments be supplied or not.[1] The assembling must have reference to the bad character of the persons and the circumstances must be such that the licensee must be held to have known their character.[2] That the offence was committed "knowingly" may be presumed from proof of the notoriety of bad fame in the district in which the premises are situated.[3]

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[1] *Patterson* v. *Findlay*, 1925 J.C. 53.

[2] *M'Kenzie* v. *M'Dougall*, 1895, 23 R. (J.) 3.

[3] *Wilson* v. *Stewart*, 1863, 32 L.J. M.C. 198; *Philip* v. *Lamb*, 1893, 1 Adam 4; *Linton* v. *Stirling*, 1893, 20 R. (J.) 71; *Hogg* v. *Davidson*, 1903, 3 F. (J.) 49.

[4] *Galloway* v. *Weber*, 1889, 16 R. (J.) 46.

[5] *Greenhill* v. *Stirling*, 1885, 12 R. (J.) 37; *Patrick* v. *Kirkhope*, 1894, 21 R. (J.) 27; *Emary* v. *Nolloth*, [1903] 2 K.B. 264; *Herriot* v. *Auld*, 1918 S.C. (J.) 16.

[6] *Kessack* v. *Smith*, 1905, 7 F. (J.) 75.

[7] *Lester* v. *Torrance*, 1877, 2 Q.B.D. 404, per Lush J.; *Young* v. *Gentle*, [1915] 2 K.B. 661.

[8] *Lewis* v. *Dodd*, [1919] 1 K.B. 1.

402. The Prevention of Crimes Act, 1871,[4] strikes at the harbouring of thieves or the deposit of stolen property in licensed premises of all sorts.

(vi) *Permitting the Assembly of Young Persons.*

403. The certificates prohibit the permitting girls or boys to assemble, but no age limit is imposed. The condition following, however, prohibits the supplying of liquor to girls or boys apparently under the age of fourteen, and it appears probable that this age limit must be read into the previous condition. The various enactments relating to children and young persons are treated of subsequently.[5]

(vii) *Permitting Drunkenness on Premises.*

404. To allow drunkenness on the premises is an offence. Sec. 98 provides that where any person has been found drunk on licensed premises the onus is on the licensee to prove that he and his employees took all reasonable steps for preventing drunkenness on the premises. The offence consists in allowing persons who are drunk to remain on the premises, and licensees ought to clear their premises of intoxicated persons. It is unnecessary for the prosecution to prove that the drunk person was actually supplied with liquor;[6] indeed, to supply such a person with liquor is complete evidence of the offence.[7] Where a licensee entertained two friends after closing hours and one of them was subsequently found drunk on the premises, it was held that the licensee had not discharged the onus laid on him.[8] Where two sober men accompanied by one drunk man entered a public house and the barman supplied the two sober men with liquor on condition that they took their companion home, it was held that no offence had been committed.[9] No onus is laid on the licence-holder when the person found drunk on the premises is his employee.[10]

(viii) *Supplying Liquor to Intoxicated Persons.*

405. The hotel certificate prohibits the supply of liquor to intoxicated persons, while the public-house and grocer's certificates prohibit the sale or supply. It is sufficient to prove that the recipient was in fact intoxicated, ignorance or lack of discernment on the licensee's part being irrelevant.[1] If an intoxicated man and a sober man enter together and the latter orders and pays for liquor for both, an offence is committed.[2] It is none the less an offence if the actual sale or supplying was carried out by an employee, and it is not in the ordinary case necessary in a complaint against the licensee to specify that it was so carried out.[3]

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[1] *Belasco* v. *Hannant*, 1862, 6 L.T. 577; *Kirton* v. *Cadenhead*, 1880, 8 R. (J.) 4; Purves, p. 266.

[2] *Somerset* v. *Wade*, [1894] 1 Q.B. 574.

[3] *Maxwell* v. *Malcolm*, 1879, 7 R. (J.) 5.

[4] 34 & 35 Vict. c. 112, s. 10.

[5] See para. 433, *infra*.

[6] *Hope* v. *Warburton*, [1892] 2 Q.B. 134.

[7] *Edmunds* v. *James*, [1892] 1 Q.B. 18.

[8] *Kessack* v. *Smith*, 1905, 7 F. (J.) 75; *Lawson* v. *Edminson*, [1908] 2 K.B. 952.

[9] *Souter* v. *Auchinachie*, 1909 S.C. (J.) 16.

[10] *Campbell* v. *Cameron*, 1916 S.C. (J.) 1.

(ix) *Permitting Unlawful Games.*

406. The prohibition against permitting unlawful games appears in the hotel and public-house certificates, but not in the grocer's. A game otherwise lawful is not rendered unlawful because it is played for a stake.[4]

(x) *Selling Liquor or Allowing Drinking in Prohibited Hours.*

407. The prohibition in the certificate for inns and for public-houses is that the licensee do not, except during the permitted hours, either by himself or by any servant or agent, sell or supply to any person any exciseable liquor to be consumed either on or off the premises save as allowed by law; while in the grocer's certificate the qualifying words "to be consumed either on or off the premises" are omitted. As has already been pointed out, these prohibitions were inserted in the certificates as the result of the 1921 Act, which dealt particularly with permitted hours.[5] Sec. 4 of that Act provided that, subject to its own provisions, no person might, except during the permitted hours, either by himself or by any agent or servant, sell or supply to any person in any licensed premises or club any exciseable liquor to be consumed either on or off the premises. It may be an offence to supply liquor even although there be no sale.[6] "Supply" is equivalent to "furnish with." [7] Even the consumption of exciseable liquor in licensed premises after permitted hours by a customer who was supplied during the permitted hours is an offence.[8]

408. While the 1921 Act makes the general law more stringent, a number of exceptions are formulated.[9] Residents in inns and hotels may be supplied in prohibited hours, but the privilege does not extend to the guests of a resident.[10] Exciseable liquor may be ordered from a licensed grocer and despatched by him outwith permitted hours. Exciseable liquor may be consumed with a meal in licensed premises at any time within half an hour after the conclusion of the permitted hours, provided the liquor was supplied during permitted hours and served at the same time as the meal and for consumption at the meal. The sale outwith permitted hours of liquor to a trader for the purposes of his trade or to a club for the purposes of the club is also legal.

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[1] *Linton* v. *Stirling*, 1893, 20 R. (J.) 71; *Cundy* v. *Le Cocq*, 1884, 13 Q.B.D. 207.

[2] *Scatchard* v. *Johnson*, 1888, 57 L.J. M.C. 41; *Brown* v. *M'Kechnie*, 1916 S.C. (J.) 20.

[3] *Hall* v. *Begg*, 1928 J.C. 29.

[4] *Hoggan* v. *Wood*, 1889, 16 R. (J.) 95.

[5] S.R. & O., 1921, 1600, S. 83, para. 371, *supra*.

[6] Purves, p. 425; see *MacKenna* v. *Brady*, 1918 J.C. 37.

[7] *M'Bain* v. *Mitchell*, 1927 J.C. 57, per Lord Sands.

[8] 1921 Act, s. 4 (*b*); *Feeney* v. *Miller*, 1925 S.C. 65.

[9] Sec. 5.

[10] *M'Bain* v. *Mitchell*, 1927 J.C. 57.

(xi) *Exceptions—Necessity.*

409. Any holder of a certificate may supply exciseable liquors from his licensed premises, at any time which would be otherwise illegal, on an order stating why such liquor is required, signed by an officer of police, including any constable in charge of any police station, or procurator-fiscal, or medical officer, or in case of sickness, accident, or emergency by a qualified medical practitioner, which order falls to be transmitted by post, with a note of the description and quantity of liquor supplied and the name and address of the person supplied, to the procurator-fiscal within forty-eight hours, who in turn transmits it to the clerk of the Licensing Court seven days before the half-yearly Court.[1]

(xii) *Supplying of Travellers.*

410. Prior to the amendment of the form of the certificate as the result of the 1921 Act, there appeared in the old form a saving for "refreshment to travellers" during prohibited hours and an exception also on Sundays "for the accommodation of . . . travellers." Moreover, the 1903 Act [2] made it a breach of the certificate "to sell or give out exciseable liquor on Sunday to any traveller except for the personal use of, and to be drunk by, such traveller within such inn or hotel or on the premises belonging thereto." The 1921 Act makes no exception in favour of the traveller who is not a resident, but the section of the 1903 Act is not repealed. In these circumstances the view has been expressed that the supply of liquor to *bona fide* travellers outwith permitted hours is no longer legal.[3] The same considerations do not appear to apply in the case of Sundays, particularly in view of the terms of s. 60 of the 1903 Act.[4] The question of what is or what is not a *bona fide* traveller depends on the circumstances of each case. The important elements are, first, distance, which is essential, and second, whether the mission on which the applicant was engaged was a mission solely for the purpose of obtaining the drink, or was for a different purpose, whether of business or pleasure.[5] A person falsely representing himself a traveller in order to obtain liquor commits an offence.[6]

(xiii) *Maintenance of Good Order.*

411. No definition is given of the meaning of the condition as to maintenance of good order and rule in licensed premises, and it is probably covered by the condition that the licensee do not knowingly permit a breach of the peace.[1]

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[1] Sec. 55, as amended by 1913 Act, s. 11. [2] Sec. 60. [3] Purves, p. 429.

[4] *Millar* v. *Donald*, 1927 J.C. 7 ; *Henderson* v. *Ross*, 1928 J.C. 74.

[5] *Millar* v. *Donald*, *supra*, per Lord Justice-Clerk Alness ; *Johnston* v. *Laing*, 1876, 3 Coup. 250, per Lord Young.

[6] Sec. 61.

Subsection (4).—*Breach of Conditions of Permission to Sell on Special Occasions.*

412. As already explained, permission to sell may be obtained on special occasions.[2] Failure to observe the conditions of such a permission involves an offence.

Subsection (5).—*Breach of Conditions in Public-house Certificate.*

413. In addition to the conditions already considered, there appears in the public-house certificate and also in the grocer's certificate a prohibition against the receiving or taking in, as the price or for the supply of exciseable liquors, any wearing apparel, goods, or chattels. The Tippling Acts, 1751 and 1862,[3] make it an offence to take a pledge or pawn in security for liquor. Brokers or pawnbrokers may not carry on business as publicans or retailers of exciseable liquor except in certain cities.[4]

Subsection (6).—*Breach of Conditions in Grocer's Certificate.*

414. In the grocer's certificate there is a prohibition against selling for consumption on the premises.[5] While it prohibits from giving drink in the exercise of his business, it does not preclude him from giving hospitality.[6] No offence is committed if a customer tests liquor while negotiations for purchase are in progress.[7] But where a customer's friend was given a drink gratuitously on the footing that he might become a customer, it was held that no genuine hospitality was intended and that an offence was committed.[8] What constitutes hospitality is a question of fact and circumstances.[9]

Subsection (7).—*Offences created by the Licensing Acts, not being Breaches of Certificate.*

(i) *Harbouring Constables on Duty or Bribing Them.*

415. A licensed person who knowingly [10] harbours constables while on duty [11] or supplies any liquor or refreshment to them whilst on duty, unless by authority of some superior officer of such constables, or bribes or attempts to bribe them, is liable in a penalty not exceeding £10 for the first offence, and not exceeding £20 for any subsequent offence.[1]

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[1] Purves, p. 277.

[2] 1903 Act, s. 40, para. 378, *supra*.

[3] 24 Geo. II. c. 40; 25 & 26 Vict. c. 38.

[4] 55 & 56 Vict. c. 55, s. 440; s. 5, Schedule II.

[5] *Kay* v. *Gemmell*, 1884, 12 R. (J.) 14; *M'Petrie* v. *Cadenhead*, 1885, 12 R. (J.) 35.

[6] *Smith* v. *Stirling*, 1878, 5 R. (J.) 25; *Kay* v. *Gemmell*, *supra*.

[7] *Lennox* v. *Ferguson*, 1882, 5 Coup. 33.

[8] *Macpherson* v. *Campbell*, 1892, 19 R. (J.) 99.

[9] *Cameron* v. *Mitchell*, 1899, 1 F. (J.) 53.

[10] See *Sherras* v. *De Rutzen*, [1895] 1 Q.B. 918.

[11] See *Greig* v. *Stewart*, 1877, 3 Coup. 382.

(ii) *Distributing Liquor from Vans.*

416. It is not lawful for any licensed person or his servant to sell, deliver, or distribute any exciseable liquor from any van, barrow, basket, or other vehicle or receptacle, unless before the liquor has been despatched it has been ordered, and the quantity, description, and price, together with the name and address of the person to whom it is to be supplied, have been entered in a delivery book or invoice to be carried by the person delivering the liquor, and in a day book kept on the premises; nor is it lawful to carry in any such vehicle liquors not entered in such books or invoice; nor to deliver from such vehicle any exciseable liquor at any address not specified as aforesaid. Any constable may examine any vehicle used for carrying such liquors, and the driver, if asked, must exhibit his delivery book or invoice. Every person convicted of an offence in this respect is deemed guilty of hawking exciseable liquors, and liable in the penalties therefor, and every holder of a certificate, if convicted, is deemed guilty of a breach of his certificate, and liable accordingly.[2] The licensee is not liable to any penalty in respect of an offence committed by his servant or agent if he proves that the offence was committed without his knowledge or consent.

(iii) *Collecting Rates and Taxes on Licensed Premises.*

417. The collection of rates and taxes on licensed premises is prohibited. The offence is committed by the person collecting. The licensee is not penalised. The section applies to public rates and taxes, not to rents and feu-duties.[3] The penalty is one not exceeding 40s.[4]

(iv) *Shebeening.*

418. To traffic in exciseable liquors without a certificate is an offence. "Shebeen" means and includes every house, shop, room, premises or place in which exciseable liquors are trafficked in by retail without a certificate and Excise licence.[5] The following penalties are incurred under s. 65, viz. for a first offence, a sum not exceeding £50; for a second and every subsequent offence, a sum not exceeding £100; with expenses of the conviction in each case, which penalties are over and above any penalty incurred by reason of trafficking under any Act relating to Inland Revenue or Excise. It is also provided that a person may be convicted on proof by the oath of one or more credible witness or witnesses or other legal evidence.[6] A warrant to apprehend any person complained of for carrying on a shebeen may be granted by any one justice or magistrate.[7] Cases have frequently occurred where the point of controversy has been the exact place where the sale has taken place. The rule followed has been that the substantial part of the transaction must have taken place on the uncertificated premises.[1]

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[1] Sec. 62.

[2] 1921 Act, ss. 7, 21 (1) (*f*), repealing 1903 Act, s. 63; see also 1903 Act, s. 67.

[3] Purves, p. 165.

[4] Sec. 64.

[5] Sec. 107.

[6] Sec. 65.

[7] Sec. 93.

419. "Trafficking" means and includes bartering, selling, dealing in, trading in, exposing, or offering for sale by retail.[2] In order to warrant the conviction of any person for trafficking in exciseable liquors without a certificate it is sufficient, in the absence of contrary evidence, to prove that some person other than the owner or occupant of the premises was at the time charged found in such place or premises drunk or drinking, or having had drink supplied to him therein, and that such place or premises is or are by repute kept as a shebeen, or at the time charged contained drinking utensils and fittings usually found in houses licensed for the sale of exciseable liquors.[3]

420. Warrants may be granted, after personal examination of a credible witness on oath that there is reasonable ground for believing that exciseable liquors are trafficked in within any premises within a county or burgh, which are not licensed premises, to search for and seize exciseable liquors, if the same be found, exceeding one gallon, together with the vessel or vessels in which the same are contained. The warrant endures for one month. The person occupying or using the premises where such liquors are found shall be guilty of an offence, and on conviction shall incur the following penalties, viz. for the first offence a sum not exceeding £5, and for every subsequent offence a sum not exceeding £10; and the liquors and vessels shall be forfeited and sold without further warrant, the proceeds being applied in terms of the Act.[4] A warrant of search was held to be lawfully granted by a justice or magistrate who was the holder of a certificate under the Acts.[5]

(v) *Being found Drunk or Drinking in Shebeens.*

421. Every person found in any shebeen drunk or drinking is guilty of an offence, and may be taken into custody, and on the first lawful day thereafter brought before a justice of the peace or magistrate, or, if liberated on bail or pledge, may be summoned to appear before them, and on conviction to pay a fine not exceeding 10s.[6] This constitutes an offence under the First Schedule of the Inebriates Act, 1898.

422. Every person bartering or selling spirits without having obtained a certificate, and every dealer in groceries or other provisions to be consumed elsewhere than on the premises supplying, whether gratuitously or otherwise, spirits to be consumed on the premises, is guilty of an offence, and liable in the same penalties as for shebeening. Any person who shall have been convicted three times under this section shall be incapable of holding a licence for the sale of exciseable liquors in all time coming.[7]

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[1] Purves, p. 169; *Cameron* v. *Buchan*, 1896, 23 R. (J.) 46; *Guild* v. *Freeman*, 1898, 25 R. (J.) 106; *Stephenson* v. *Rogers*, 1899, 80 L.T. 193.

[2] Sec. 107.

[3] Sec. 97.

[4] Sec. 96.

[5] *Costadasi* v. *Boyes*, 1894, 21 R. (J.) 75.

[6] Sec. 75.

[7] Sec. 66.

(vi) *Hawking Exciseable Liquors.*

423. This means and includes "trafficking in or about the streets, highways, or other places, or in or from any boat or other vessel upon the water."[1] Every person hawking exciseable liquors is guilty of an offence, and may be taken into custody by any person whomsoever, or, if not taken into custody or liberated on bail or pledge, may be summoned to appear before a justice of the peace or magistrate. On conviction such person is liable in a penalty not exceeding £10.[2] Hawking is a trade carried on irrespective of trade premises. A hawker is an itinerant trader who brings the goods to his customers wherever they may be.[3] One act of sale is sufficient to constitute hawking.[4] Where hawking by a servant is known to the master, both may be convicted.[5] It is not hawking for a member of a club to take money from a man, purchase liquor in the club and thereafter on the street hand it to his friend who consumes it there.[6] But where an accused so acted several times on the same day and made a profit on the transactions, the offence was held to have been committed.[7] Everything turns on the facts of each particular case.[8]

424. If any person licensed to sell by retail any exciseable liquors, not to be consumed on the premises, permits to be taken and carried from his premises any such liquors for the purpose of being sold or hawked on his account, or for his benefit or profit, or to be consumed in any tent, shed, or other premises belonging to him, or in which he may be interested, such liquors are deemed to have been drunk upon the premises of the person so licensed, who must be deemed guilty thereby of a breach of his certificate, and liable accordingly.[9]

(vii) *Inducing Grocer to Sell Exciseable Liquors Illegally.*

425. If a person, having purchased liquor from a dealer or grocer, drinks the same on the premises, he is liable in a penalty not exceeding 40s.[10]

(viii) *Disorderly Conduct and Drunkenness.*

426. A penalty not exceeding 40s. is exigible for disorderly conduct in licensed premises and refusing to quit when requested, or refusing to do so at the time of closing prescribed by the Act, and constables are authorised and empowered to assist in expelling such disorderly persons refusing to quit at the hour of closing.[11]

427. Every person who is drunk and incapable, and not under the care of some suitable person, in any street or public place or on licensed premises, and every person who is drunk while in charge of any carriage, horse, cattle, or steam-engine, or when in possession of loaded firearms, is guilty of an offence, and on conviction is liable in a fine not exceeding 40s., and failing payment to imprisonment for a period not exceeding thirty days.[1] A similar penalty is imposed on persons behaving, while drunk, in a riotous manner, or while drunk using obscene or indecent language to the annoyance of any person, and it is also in the discretion of the Court to refuse to give the option of a fine. A similar penalty is also imposed on persons if drunk while having the charge of a child under seven years of age, but imprisonment is only in the event of failure to pay the fine.[1] An offence under this section is to be deemed to be an offence mentioned in the First Schedule to the Inebriates Act, 1898. The provisions of this section are to be held as included in the Burgh Police (Scotland) Act, 1892, and local Acts applying to Edinburgh, Glasgow, Aberdeen, Dundee, and Greenock, and in lieu of any enactments dealing with the same matters mentioned in said Acts. Any person liberated on bail or pledge failing to appear may have such bail or pledge forfeited, and, if the case requires it, a warrant may be granted for his apprehension. For the purposes of the section "public place" includes any railway station, and any place to which the public have access, whether on payment or otherwise, and any public conveyance, and the expressions "carriage" and "cattle" have the meanings respectively assigned thereto in the Burgh Police (Scotland) Act, 1892 (*i.e.* "carriage" means any vehicle for the conveyance of persons, animals, or goods, *e.g.* a hand-cart; and "cattle" means any live stock, *e.g.* horse, cow, sheep, swine, etc.). "Public place" also includes the Harbour of Glasgow, and "public conveyance" includes the ferry-boats on the River Clyde. Sec. 13 (as modified) of the Police (Scotland) Act, 1857, is extended to apply to Orkney and Shetland.[1]

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[1] Sec. 107.

[2] Sec. 67.

[3] *Hutcheon* v. *Cadenhead*, 1892, 19 R. (J.) 32, per Lord Rutherfurd Clark.

[4] *Russell* v. *Paton*, 1902, 4 F. (J.) 77.

[5] *Hogg* v. *Davidson*, 1901, 3 F. (J.) 49.

[6] *Dewar* v. *Neilson*, 1900, 2 F. (J). 57.

[7] *Neilson* v. *Dunsmore*, 1900, 3 F. (J.) 6.

[8] *Cameron* v. *Buchan*, 1896, 23 R. (J.) 46; *Pletts* v. *Beattie*, [1896] 1 Q.B. 519; *Muir* v. *Campbell*, 1888, 16 R. (J.) 20.

[9] Sec. 57.

[10] Sec. 69.

[11] Sec. 68.

(ix) *Supplying Drunkards with Liquor.*

428. Sec. 72 prohibits the sale of exciseable liquors for three years to persons convicted four times for drunkenness, and penalises such persons on the "blacklist" if they purchase or even attempt to purchase exciseable liquor, as well as any licensee knowingly supplying liquor to such person.

(x) *Drinking in Places of Refreshment.*

429. Sec. 76 penalises owners of temperance refreshment houses, tobacconists, etc., allowing drinking therein during hours when licensed houses are closed. This provision is intended to deal with the evils arising from the custom of taking exciseable liquors into ice-cream shops, refreshment rooms, etc., and consuming them there during the hours when licensed premises are closed.

(xi) *Procuring Liquor for Drunken Person.*

430. It is an offence for any person who is on licensed premises to procure or attempt to procure liquor for consumption by a drunken person, or to aid such person in obtaining or consuming liquor.[2]

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[1] Sec. 70.

[2] Sec. 74.

(xii) *False Representation as Traveller.*

431. It is an offence for any person to obtain liquor by false representation that he is entitled to obtain it as a lodger or traveller.[1]

(xiii) *Restriction of Credit in Liquor Sales.*

432. It is an offence to sell or supply or to consume liquor on licensed premises unless it is paid for before or at the time when it is sold or supplied. If, however, the liquor is sold or supplied for consumption with a meal, it may be paid for along with the price of the meal. These provisions do not affect the sale of liquor for consumption off the premises.[2]

(xiv) *Sale of Liquor to Young Persons.*

433. It has always been the policy of the Licensing Acts to protect children. It is a condition of the certificate that exciseable liquor be not supplied to a child apparently under fourteen. The provisions of the 1903 Act[3] are now superseded by the Intoxicating Liquor (Sale to Persons under Eighteen) Act, 1923.[4] Under this Act a licence-holder commits an offence if he knowingly sells or allows to be sold to a person under the age of eighteen years, exciseable liquor to be consumed on the premises whether by that person himself or by some other person, subject to the proviso that the sale of beer, porter, cider, or perry is not prohibited to or by a person over sixteen where such liquor is sold for consumption at a meal to be consumed at the same time in such portion of the premises as is usually set apart for the service of meals. A licence-holder also commits an offence if he knowingly allows a person under the age of eighteen years to consume liquor in any bar on the premises. A servant of the licence-holder may be guilty of the offences in question. The young person himself or any person who purchases or attempts to purchase liquor for him, except as allowed by the statute, commits an offence.

SUBSECTION (8).—*Other Offences.*

434. In addition to the offences created by the Licensing Acts themselves there are a number of other offences created by other Acts.[5] It is illegal to pay wages to a workman in the precincts of any place used for the sale of liquor.[6] Licensed premises may not be used as a committee-room at a parliamentary or municipal election,[7] or for meetings at municipal, school board, parish, or county council elections.[8] If a licensee be convicted of bribery or of treating on his licensed premises, the matter is brought before the justices who granted him his certificate and may be a ground for refusal to renew. An hotel-keeper or publican who refuses or neglects to receive troops billeted on him, or seeks to be relieved of the burden by bribing a constable or a soldier, is liable to penalties.[1] Rooms in which persons suffering from infectious disease have lodged must be disinfected.[2] Penalties are inflicted for failure to keep proper urinals and closets.[3]

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[1] Sec. 61.
[2] 1921 Act, s. 8.
[3] Secs. 58–59.
[4] 13 & 14 Geo. V. c. 28.
[5] Purves, p. 133.
[6] *Ibid.*, and statutes there mentioned.
[7] 46 & 47 Vict. c. 51, s. 20.
[8] *Ibid.*; 53 & 54 Vict. c. 55, ss. 2, 20, 21; 57 & 58 Vict. c. 58, s. 14 (4).

435. Public-houses and licensed grocer's premises are shops within the meaning of the Shops Act, 1912.[4] The residential part of an hotel does not fall under this Act, but public parts of an hotel such as a restaurant do.[5] So far as hours of employment of shop assistants are concerned, licensed premises may fall under s. 1 of the 1912 Act, or under the Shops Act, 1913,[6] according as the occupier of the premises elects to come under the latter Act or not.[7] Licensed premises are exempt from the compulsory closing of shops on the weekly half-holiday unless the closing provisions are extended to such premises by order of the local authority with the approval of two-thirds of the occupiers of the premises.[8]

SECTION 6.—LEGAL PROCEEDINGS.

SUBSECTION (1).—*Prosecution of Offences.*

436. All offences under the Licensing Acts are tried and determined under the provisions of the Summary Jurisdiction Acts, except where inconsistent with the Licensing Acts, before the Sheriff, or any two or more justices of the peace of a county, or any magistrate of a royal, parliamentary, or police burgh having jurisdiction. Prosecutions may be proceeded with in absence, upon proof by the oath of an officer or constable that the accused has been duly summoned. Offences under the Acts may, unless the Acts otherwise specially direct or authorise, be tried as police offences before any magistrate or magistrates of any royal, parliamentary, or police burgh officiating in any Court for the trial of police offences under the provisions of any local or general police Act for the county, district, or burgh.[9] A complaint may competently be brought under the Burgh Police Act. This section of the statute authorises proceedings under either the Burgh Police Act or Summary Jurisdiction Act.[10] The Summary Jurisdiction Act applies where the proceedings are instituted under a Police Act, and the prosecutor cannot, by relying on a Police Act, render nugatory any of the provisions of the Summary Jurisdiction Act which operate in favour of the accused.[11] The provisions of this latter Act must always be kept in view. In *Tasker* v. *Simpson*[12] it was held that justices of the peace have concurrent jurisdiction with the magistrates of a police burgh within the county to try persons resident in the burgh for offences against the Licensing Act committed in the burgh. The trial of offences under the Summary Jurisdiction Acts provided by s. 91 (3) gives the right to enforce the warrant in other counties on the conditions therein provided.

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[1] Army Act, 1881 (44 & 45 Vict. c. 58), ss. 102–110, as amended by 10 Geo. V. c. 7, s. 18.

[2] 30 & 31 Vict. c. 101, s. 51.

[3] 55 & 56 Vict. c. 55, s. 256.

[4] 2 Geo. V. c. 3, s. 19; *Prance* v. *London County Council*, [1915] 1 K.B. 688.

[5] *Gordon Hotels, Ltd.* v. *London County Council*, [1916] 2 K.B. 27.

[3] 2 & 3 Geo. V. c. 24.

[7] Purves, p. 135.

[8] Shops Act, 1912 (2 Geo. V. c. 3), s. 4 (6), Schedule II.

[9] Sec. 91.

[10] *Rowland* v. *Deas*, 1906, 8 F. (J.) 86.

[11] *Gray* v. *Dewar*, 1889, 16 R. (J.) 97.

[12] 1904, 7 F. (J.) 33.

SUBSECTION (2).—*Who may Prosecute.*

437. Every person who shall commit any breach of certificate, or who shall in any other manner offend against the Act, shall be prosecuted, and all penalties, together with the expenses of prosecution and conviction, shall be recovered at the instance of the procurator-fiscal, or other prosecutor ordinarily acting in the Courts mentioned in the preceding paragraph, or in the case of a Justice of the Peace or Burgh Police Court at the instance of such other party as shall be specially appointed to prosecute such class of offences by the justices of the peace of the county in general Quarter Sessions assembled, or the town council of the burgh as the case may be. The justices or town council, as the case may be, are empowered to fix a salary or a reasonable rate of remuneration by fees for prosecutions and all other business under the Act, to be paid annually to such procurator-fiscal or other party appointed to prosecute (and if an account of fees to be subject to taxation) out of the fund of the county out of which the expenses of criminal prosecutions are in use to be paid, and in royal or parliamentary burghs having a separate Licensing Court out of the police funds, or where there are no police funds out of the corporation funds of the burgh. A burgh prosecutor in a police burgh is not entitled under s. 91 (1) of the Act to be remunerated by the county council in respect of prosecutions specified in s. 70, such offences being in virtue of subsection (4) of that section offences against the Police Acts and not against the Licensing Acts.[1]

SUBSECTION (3).—*Application of Penalties and Expenses.*

438. All penalties and expenses of prosecutions and convictions incurred under and imposed by the Act shall, when recovered, if adjudged by any Sheriff, or justice of the peace, or magistrate of any burgh (if it does not have a separate Licensing Court), be wholly paid into the county fund; and if adjudged by any magistrate of any royal or parliamentary burgh having a separate Licensing Court, be paid into the police or corporation funds of the burgh in which such penalties shall be imposed respectively.[2]

SUBSECTION (4).—*Citation and Procedure.*

439. The *induciæ* of citation on a complaint for committing a breach of certificate are six clear days before the diet of appearance.[3] If the person complained of cannot be found personally he may be cited at his place of abode or at his licensed premises. He may be convicted on his own confession or by the testimony on oath of one or more credible witnesses, or upon other legal evidence.[1] The *induciæ* on complaints for offences other than breach of certificate are regulated by the Summary Jurisdiction Act,[2] viz. forty-eight hours unless the Court fixes a shorter period.

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[1] *Smith* v. *Ayr County Council*, 1907 S.C. 649.

[2] Sec. 91.

[3] *Laird* v. *Anderson*, 1895, 23 R. (J.) 14.

SUBSECTION (5).—*Chief Officer of Police to Report Offences.*

440. The chief officer of police is required, without undue delay, to report to the procurator-fiscal or other party directed to prosecute offenders all offences against the Act coming to his knowledge, and at all times to use the means within his control for the detection and, when necessary, the apprehension of all offenders.[3]

SUBSECTION (6).—*Police Powers of Entry.*

441. Officers of police of the rank of inspector or those holding a higher rank may enter and inspect all places [4] where food or drink of any kind is sold to be consumed on the premises, or in which they have reason to believe that exciseable liquors of any kind are being unlawfully trafficked in; provision is also made for any constable having an authority in writing from any justice of the peace or magistrate, or from any chief constable, superintendent, lieutenant, or inspector of police, to enter and inspect any such places at any time within eight days from the date of such writing as may be specially mentioned in such writing; and any person who shall refuse to admit, or shall not admit, such officers of police or constable shall incur a penalty not exceeding £10. Any officer or constable may at any time enter and inspect any inn and hotel, or public-house; and also, where he shall have reason to believe that a breach of certificate is being committed, at any time to enter and inspect the premises of any grocer or provision dealer trading in exciseable liquors. Parties refusing to admit, not admitting, or offering obstruction to the admission of constables, render themselves liable in a similar penalty to that above mentioned.[5] A policeman must say who and what he is and by what authority he claims admission.[6] The police were refused admission to a room in a public-house in Bristol, temporarily used for a meeting by members of a friendly society. The Court held that, under the circumstances, the refusal was justifiable, and quashed a conviction which had been obtained against the publican.[7]

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[1] Sec. 92.

[2] Summary Jurisdiction Act, 1908, s. 21.

[3] Sec. 94.

[4] Purves, p. 233.

[5] Sec. 95.

[6] *Alexander* v. *Rankin*, 1899, 1 F. (J.) 58.

[7] *Duncan* v. *Dowding*, [1897] 1 Q.B. 575.

SUBSECTION (7).—*Certification of Convictions to Licensing Court and to Inland Revenue.*

442. A certified extract of every conviction for a breach of certificate shall, within six days after such conviction, be transmitted by the clerk of Court to the clerk of the Licensing Court within whose jurisdiction the convicted party resides, under a penalty of £5, and the clerk to the Licensing Court shall enter same in a register to be kept for that purpose, and specifying whether it is the first, second, or third conviction, and such register shall be produced by the clerk to the Licensing Court at every general meeting thereof.[1] The clerk to the Licensing Court shall certify to the Commissioners of Inland Revenue of the district such conviction, by which conviction such certificate has thereupon been adjudged null and void, which certificate of conviction shall be transmitted within six days if such clerk officiated as the clerk of Court, or if not, then within six days after such conviction shall have been transmitted to him, under pain of forfeiture by such clerk of a Licensing Court of the sum of £5.[2]

SUBSECTION (8).—*Appeal to Quarter Sessions.*

443. If any person considers himself aggrieved by any judgment, whether of conviction or absolvitor, given upon any complaint presented under the Act, by any two or more justices, he can appeal to the next meeting of the justices at Quarter Sessions, provided that the appeal shall not be heard unless the appellant shall, within eight days next after the judgment, lodge his appeal with the justices' clerk, and deposit with such clerk the amount of penalty and expenses awarded against him, and shall find caution with such clerk to abide such appeal and to pay such sums as shall be finally awarded, and shall give intimation by serving a copy of the appeal on the opposite party within said period of eight days.[3] No appeal under this section is competent against the judgment of a magistrate; in such a case the aggrieved person must rely on s. 102, or proceed by stated case under the Summary Jurisdiction Act.

SUBSECTION (9).—*Appeal to High Court of Justiciary.*

444. An appeal lies to the High Court of Justiciary against any order or decision, on the grounds of corruption, malice, and oppression on the part of the Sheriff, justice or justices of the peace or magistrate, or on such deviations in point of form from the statutory enactments as the Court shall think prevented substantial justice from being done. Notice in writing of such appeal must be given to the opposite party and to the clerk of the Court pronouncing such order or decision within eight days of the date thereof, and no appeal shall be received or entertained unless the party appealing shall, along with his appeal, deposit with the Clerk of Justiciary a certificate under the hand of the Sheriff-clerk, town-clerk, or clerk of the peace, or clerk to the magistrates or Police Court, as the case may be, that he has made consignation in the hands of such clerk of the whole sum and expenses, if any, decerned for, and unless he shall have found sufficient security for the whole expenses which may be incurred and found due under the appeal. This mode of appeal does not interfere with the right of appeal to Quarter Sessions or with the right of appeal under the Summary Jurisdiction Act, 1908, or the Burgh Police (Scotland) Act, 1892.[1] In view of the somewhat limited grounds on which appeal under this section is allowed, the usual course is to take advantage of the provisions of the 1908 Act as to appeal by stated case.[2] Suspension is competent where a sentence is fundamentally null [3] but not where the objection is merely one of form.[4]

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[1] Sec. 99.

[2] Sec. 100.

[3] Sec. 101.

445. Sec. 103 provides that no warrant, sentence, order, decree, judgment, or decision made or given by Quarter Sessions, Sheriff, justice or justices, or magistrate, in any cause, prosecution, or complaint, or in any other matter under the authority of the Act, shall be subject to reduction, suspension, or appeal, or any other form of review or stay of execution, on any ground or for any reason whatever, other than by the Act provided.[5] Despite the wide terms of the section, its effect is limited. The position with regard to appeal by stated case and suspension has just been dealt with. Moreover, the section does not apply to the review of decisions in the Licensing Courts in the granting or refusing of certificates.[6]

SUBSECTION (10).—*Limitation of Actions.*

446. Every action against any judge, clerk, official, or other person on account of anything done in execution of the Act must be commenced within two months after the cause of action or prosecution has arisen, and not afterwards, excepting the provisions of ss. 24, 25, 99, and 100. Prior to the 1903 Act it was held that there was no limitation if the act complained of was *ultra vires.*[7] The limitation is "on account of anything done in the execution of the Act," and does not apply if the act is *ultra vires.* Nor does it apply in the case of reductive conclusions for setting aside incompetent and illegal proceedings. It does apply to conclusions for damages.[8] The limitation does not apply to suspensions or appeals under s. 102.[9]

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[1] Sec. 102.

[2] Summary Jurisdiction Act, 1908, s. 60.

[3] *Morrison* v. *Peters*, 1909 S.C. (J.) 58.

[4] *Mitchell* v. *Morrison*, 1908 S.C. (J.) 65.

[5] Sec. 103.

[6] *Walsh* v. *Mags. of Pollokshaws*, 1907 S.C. (H.L.) 1, at p. 4; Purves, p. 246.

[7] *Boyd* v. *Hyslop*, 1902, 9 S.L.T. 466.

[8] *Ashley* v. *Mags. of Rothesay*, 1873, 11 M. 708.

[9] Purves, p. 246.

SUBSECTION (11).—*Disqualification of Clerk to Courts, etc.*

447. No solicitor or other person being a clerk to a Licensing Court or a Court of Appeal, and no procurator-fiscal or other person entrusted with the prosecution of offences against the Act may by himself, his partner, or clerk as solicitor or agent for any person, conduct or act in any application for, or in respect of, a certificate or any other proceedings whatsoever under the Act before such Licensing Court or Court of Appeal under a penalty not exceeding £100.[1]

SUBSECTION (12).—*Clerks: Duties: Penalties.*

448. It is the duty of the clerk to the Licensing Court to make out the certificate granted.[2] If the clerk issue a certificate contrary to the deliverance of the Court, or insert an untrue date therein, or refuse to deliver it, he exposes himself to a fine of £20 for each offence.[3] He must also transmit within eight days to the Inland Revenue collector of the district a certified list of all persons therein who have obtained certificates for the current year, being under a penalty of £5 if he fails to do so.[4] Duplicate certificates certified by the clerk, and issued on payment of 1s., when lawfully required, are admitted as evidence.[5] The fees of the clerks are fixed by Act of Sederunt, a penalty being inflicted if higher fees are demanded, and provision is made for the allocation of the fees between clerks of the peace and town clerks, etc.[6] It is also a duty to transmit within six days extracts of convictions to the clerk of the Licensing Court, where the trial is in a different Court, and the clerk must enter them in his register and produce the register at every general meeting, as well as certify the Commissioners of Inland Revenue of the district within six days where the certificate has been adjudged null and void.[7]

SECTION 7.—TEMPERANCE (SCOTLAND) ACT, 1913.[8]

SUBSECTION (1).—*Scheme of Act.*

449. The Temperance (Scotland) Act, 1913, effected some changes in, and added some provisions to, the earlier licensing law, but the purport of these alterations and additions has already been considered. The main provisions, however, were of a novel character and form the subject of the succeeding paragraphs. The Act describes itself as one "to promote temperance in Scotland by conferring on the electors in prescribed areas control over the grant and renewal of certificates. . . ." The effect of the Act is to give to the electors in prescribed areas a power of dictating the number of licensed premises which is to be permitted to exist within the particular area. The electorate has a choice of three verdicts:[9] it may vote No-change; it may vote Limitation, viz.

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[1] Sec. 106.
[2] Sec. 16.
[3] Sec. 24.
[4] Sec. 25.
[5] Sec. 26.
[6] Sec. 27.
[7] Secs. 99 and 100.
[8] 3 & 4 Geo. V. c. 33.
[9] Sec. 2 (2).

reduction in the number of licences to be granted; or it may vote No-licence, and so render the area dry. Although the Act was passed in 1913, these provisions did not take effect till 1st June 1920.

SUBSECTION (2).—*Electoral Areas.*

450. The electoral areas prescribed by the Act are as follows: [1] In the case of a burgh (defined as a royal, parliamentary, or police burgh) divided into wards, the population of the burgh being not less than 25,000, the electoral area is the ward, except where the ward's population is under 4000 and the town council determine that such ward be combined with a ward contiguous thereto. In the case of other burghs, the electoral area is the whole burgh. In the case of a county, the parish as defined in the Local Government (Scotland) Act, 1894, is the electoral area, any burgh or part of a burgh being excluded. Where a parish is situated within two counties, the portion in each county is a separate area.

SUBSECTION (3).—*Qualifications of Electors.*

451. The qualifications for the right to vote are as follows: [2] In a burgh, any person registered as entitled to vote at an election of town councillors is entitled to vote. In a parish, the qualification is registration as being entitled to vote at an election for parish councillors.

SUBSECTION (4).—*Requisition for Poll.*

452. The statutory pre-requisite of the holding of a poll under the Act is a requisition demanding a poll in the electoral area.[3] The Act provides a form of requisition.[4] The Regulations issued by the Secretary of State for Scotland under s. 5 (3) of the Act lay down the procedure to be followed.[5] The requisition must be signed by at least one-tenth of the electors. The signatures must be appended with the full addresses of the signatories on papers issued on demand by the clerk to the local authority and bearing on each sheet the date of issue. The requisition must be lodged with the clerk not later than 30th September [6] in the year in which a poll is due to be taken. The clerk must insert in at least two newspapers circulating in the area a notice of the receipt of the requisition and must allow the requisition to be inspected by any elector.

453. After the requisition has been lodged, the local authority must satisfy itself that it has been duly signed,[7] and if it is so satisfied it must cause a poll of the electors in the electoral area to be taken. The machinery for taking the poll is fully set forth in the Regulations.[1] The Regulations also deal with corrupt and illegal practices.[2]

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[1] Sec. 15.

[2] *Ibid.*

[3] Sec. 5.

[4] Schedule I.

[5] Temperance (Scotland) Act Regulations, 1920, 9th June 1920, No. $\frac{880}{63}$ ss. 2–6.

[6] *Ibid.*, s. 3.

[7] Sec. 2; Regulations, ss. 8–10.

SUBSECTION (5).—*The Poll.*

454. At the poll, the questions to be submitted to the electors are the adoption in and for their electoral area of a no-change resolution, a limiting resolution, or a no-licence resolution.[3] A no-change resolution means that the powers of the Licensing Court in regard to the granting of certificates or otherwise are to remain as they were. So where there has been a previous poll resulting in limitation, a no-change resolution means a continuance of limitation.[4] If 55 per cent. of the votes recorded [5] are in favour of a no-licence resolution and not less than 35 per cent. of the electorate have voted in favour of it, no-licence is carried. Limitation is carried where a majority of the votes recorded are in favour of a limiting resolution and not less than 35 per cent. of the electorate have voted for it. No-change is carried where there is a majority in favour of no change or where no other resolution is carried.[6] An elector is not entitled to vote for more than one resolution, but if a no-licence resolution be not carried, the votes recorded for no-licence are added to the votes recorded for limitation.[7]

455. It must be observed that while at the original poll the issue is simply one of no licence, limitation, or no change in the sense of a continuance of the state of matters as before the Act, the issue may be somewhat more complicated at further polls.[8] The first case is simple, for if a no-change resolution is in force or a limiting resolution or no-licence resolution has been repealed, the further poll may be taken for the following options: a further no-change resolution, a no-licence resolution, or a limiting resolution.[9] But if a limiting resolution is in force the options are: (*a*) repeal of limitation; (*b*) continuance of limitation; (*c*) further limitation, or no licence, provided that if repeal is not carried the votes in favour of repeal are added to those in favour of continuance. In such a case a continuance resolution is synonymous with a no-change resolution in accordance with the somewhat ambiguous meaning given to the term "no-change resolution" by the Act.[10] Forms of ballot papers to meet the various contingencies are formed by regulation.[11] If a no-licence resolution is in force, the counter-resolution is simply repeal.[12] The provisions of s. 2 of the Act [13] with regard to the calculation of votes apply equally to further polls, provided that, where a limiting or no-licence resolution is in force and the majority of the votes recorded is not in favour of repeal, repeal is not carried.[14]

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[1] Secs. 11–22.

[2] Secs. 23–25.

[3] Sec. 2.

[4] Sec. 15.

[5] "Votes recorded" includes spoiled papers; *Latham* v. *Glasgow Corporation*, 1921 S.C. 695.

[6] Sec. 2 (3).

[7] Sec. 2 (4).

[8] Sec. 4.

[9] Sec. 4 (2) (*a*).

[10] Sec. 15.

[11] Regulations, 18th July 1923, No. $\frac{815}{\text{s. }52}$.

[12] Sec. 4 (2) (*c*).

[13] Para. 454, *supra*.

[14] Sec. 4 (3).

SUBSECTION (6).—*Effect of "No-licence" Resolution.*

456. While a no-licence resolution remains in force no certificate can be granted in the area, except that the Licensing Court may, on being satisfied that under the special circumstances of the case a certificate is reasonably required, grant one or more certificates for an inn and hotel or for premises structurally adapted for use and *bona fide* used as a restaurant.[1] Two provisos are added. The effect of the first is that an hotel-keeper can sell liquor only to those lodging in the hotel, but if he obtains special permission he may sell liquor to non-residents who take a meal on the premises and consume the liquor along with the meal. In restaurants liquor may be sold to those taking a meal and who consume the liquor along with the meal. The second proviso is that it is a condition of renewal of the certificate that the applicant shall satisfy the Court by production of an Excise licence or otherwise that he is entitled to a reduction of duty in terms of s. 45 of the Finance (1909–10) Act, 1910. This means that the applicant must shew that the receipts from the sale of intoxicating liquor in the preceding year were, in the case of an hotel, less than one-half of the total receipts and, in the case of a restaurant, less than three-fifths.

SUBSECTION (7).—*Effect of Limitation Resolution.*

457. Where a limiting resolution is carried, the Licensing Court is precluded from granting a number of certificates greater than 75 per cent. of the number of certificates in force when the resolution was carried.[2] The statute provides that the Licensing Court must prepare a provisional scheme giving effect to the reduction proposed and that, after due intimation and hearing parties on the proposed scheme, it must decide upon the certificates to be withdrawn.[3] The decision is not subject to appeal [4] to the Court of Appeal under the 1903 Act.[5]

SUBSECTION (8).—*Polling Dates.*

458. Once a poll has been taken in an electoral area a further poll cannot be taken before the month of November in the third year from the date of the last poll.[6] The polling day is fixed by the local authority for any day, not being a market day, in the month either of November or December following the lodging of a proper requisition.[7] It must be observed that in a county a poll can be taken only in the year of a triennial election of county councillors.[8] The election of county councillors takes place in every third year counting from 1892.[9] It is, however, undesirable to hold a poll under the Temperance Act in combination with another poll, and separate dates should be employed.[10]

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[1] Sec. 3 (1).

[2] Sec. 3 (2).

[3] Sec. 3 (3), (4).

[4] Sec. 3 (5).

[5] 1903 Act, s. 22.

[6] Sec. 4 (1).

[7] Sec. 5 (3); *Macfarlane* v. *Lanarkshire County Council*. 1921 S.C. 664.

[8] Sec. 5 (3).

[9] 52 & 53 Vict. c. 50, ss. 4 (30), 30.

[10] *Young* v. *Mags. of Darvel*, 1923 S.C. (H.L.) 1.

Where a poll or the declared result of it is declared null by the Court of Session, that Court may, if they think fit, order the local authority to cause a new poll to be taken, or one-tenth of the electors in the area may, by requisition, demand a new poll.[1]

SUBSECTION (9).—*Challenge of a Poll.*

459. The proviso in subsection (3) of s. 5 of the Act gives the Court of Session privative jurisdiction to declare a poll void. Irregularity or incompetency in the taking of the requisition or the poll might lead to the poll being declared void. The same effect would follow where the figures necessary to carry a resolution were mistakenly calculated so as to cause a wrong resolution to be declared carried. A discrepancy between the votes cast and the votes counted has been held enough to invalidate a poll.[2] But the issue of requisition forms to a non-elector is not sufficient.[3] Anything in the nature of fraud, forgery, or corruption might be fatal, and certain sections of the Elections (Scotland) (Corrupt and Illegal Practices) Act, 1890,[4] have been applied by Regulation [5] to the operation of the Temperance Act.

460. The proper form of procedure for the challenge of a poll is by action in the Court of Session. The action takes the form of a declarator or reduction and declarator.[6] It has not been decided whether it is competent to raise an action of suspension and interdict of proceedings between the date of lodging the requisition and the poll, founding on some incompetency or irregularity in the preliminary procedure. If such procedure were competent and successful, the result would be to postpone a poll for another year or in a county for three years.[6] There is no statutory limitation of time for bringing an action, but in practice the Regulation [7] providing for the destruction of certain documents two months after the declaration of the poll must have the effect of imposing a limitation in certain cases.

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[1] Sec. 5 (3).

[2] *Ross* v. *Mags. of Buckie*, 1921, 2 S.L.T. 212.

[3] *Latham* v. *Glasgow Corporation*, 1921 S.C. 694.

[4] 53 & 54 Vict. c. 55.

[5] Temperance (Scotland) Act Regulations, 1920, 9th June 1920, No. $\frac{880}{63}$, ss. 23 25.

[6] Purves, p. 305.

[7] Regulations, Art. 18, Schedule II.

LIEGE POUSTIE.

See DEATHBED.

LIEN.

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SECTION 1.—DEFINITION.

461. A lien may be defined in general terms as a right in one party to retain a debt, subject, or thing in which he has a legitimate interest, either of property or possession, until some debt or obligation, due to him by the party who is entitled to demand that debt, subject, or thing, is paid or performed. It is frequently spoken of as a right of retention. Although attempts have been made to distinguish the terms "lien" and "retention," it is probably impossible to frame any distinction which would bear the test of a reference to the language of the judges in the cases on the subject, where the words are often used as synonymous. Strictly speaking, it would seem that retention is the proper term in the law of Scotland, and that the word lien is a modern importation derived from a right, analogous to the Scottish right of retention, which is recognised in English law.[1] For the purpose of this article it would seem to be consistent with usage to reserve both the right to retain a debt, and the right to retain a subject held by an *ex facie* absolute title of property, for consideration under the article RETENTION, and to treat here the right of retention or lien over moveable property which is dependent on possession. In doing so there will be considered

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GENERAL AUTHORITIES.—Bell's Prin., ss. 1410 *et seq.*; Bell, Com. ii. 87 *et seq.*; Cross on Lien; Jones on Lien, vol. i.; Gloag and Irvine, Rights in Security, chaps. x., xi.

[1] See argument in *Harper* v. *Faulds*, 1791, Bell's Oct. Cas. 440.

(1) the general nature and incidents of lien, and (2) certain particular liens involving specialties.

462. A right of lien, as thus limited, may be defined, in the words of Bell,[1] as "a right to retain a subject legitimately in one's possession until a debt shall be paid, or an engagement performed, the *jus exigendi* of which is in the possessor." In the ordinary case a lien is founded on an implied condition in a mutual contract, and is distinguishable from a pledge in respect that it is the result of an implied, while a pledge is the result of an express, contract. Lien, again, is a condition or counterpart of a contract under which the possession of a subject is obtained, and not a right necessarily flowing from the fact of possession alone. The mere fact that a man happens to be in possession of property belonging to his debtor gives him no right in security over that property, or excuse for refusing to deliver it.[2] A theory has been stated by Professor More [3] in an attempt to distinguish retention and lien, to the effect that the law of Scotland gives the possessor of a subject which another party has a right to demand from him a title to retain that subject until all debts due to him by that other party are paid. According to this theory, lien is a counterpart of the diligence of arrestment or poinding, giving the possessor of goods belonging to his debtor a right in security over them similar to that which he might have acquired by the use of diligence had the goods in question been in the possession of a third party. But it may now be taken as settled that this theory is unsound, and that the mere fact of possession of a debtor's property does not give the possessor a security over it, even although the debtor may be bankrupt. Lien is an equitable right, to which the Court, in special circumstances, may refuse to give effect.[4]

SECTION 2.—DISTINCTION BETWEEN LIEN AND HYPOTHEC.

463. A lien is a right over property in one's possession, and is thereby distinguished from a hypothec. The rights known as maritime liens indeed include securities without possession, but such liens are in reality hypothecs, and have already been considered under that heading.[5]

SECTION 3.—LIEN IS DEPENDENT ON POSSESSION.

464. Although, as above stated, a lien is not a necessary consequence of possession, yet it is dependent on possession, and expires with the loss of it.[6] Possession, in this particular, involves both physical custody and a right to possess. The subject of a lien, however, need not be in the actual custody of the party claiming a lien over it, if it is held for him by an agent, such as a factor or warehouseman. Thus a law agent, on his employment being determined, may hand over papers to the new agent employed by his client, and yet preserve his lien over them.[1] And a factor has been held entitled to a lien over a policy of insurance which was held for him by a policy-broker.[2] On the other hand, the constructive civil possession obtained by a factor, to whom a bill of lading had been sent unindorsed, by paying part of the freight, has been held not to be sufficient to entitle him to claim a lien over the cargo for advances made as factor, in a case where both principal and factor were bankrupt, and the trustee in the sequestration of the former had stopped the goods *in transitu*.[3]

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[1] Bell's Prin., s. 1410.

[2] *Harper* v. *Faulds*, *supra*; *Laurie* v. *Denny's Tr.*, 1853, 15 D. 404; *National Bank* v. *Forbes*, 1858, 21 D. 79.

[3] Notes to Stair, cxxxi.

[4] *Garscadden* v. *Ardrossan Dry Dock Co.*, 1910 S.C. 178, at p. 181.

[5] See Vol. VIII., p. 1, *ante*. See also MARITIME LIENS.

[6] Bell's Prin., s. 1412.

465. Possession obtained wrongfully or accidentally will not found a lien. Thus a case where it was held that a party who had obtained possession of goods by informal diligence was entitled to keep them on the plea of lien has been disapproved.[4] And when a lease was left accidentally at a solicitor's office, it was held that the solicitor could not maintain a lien over it for the account due by the client who had left it.[5] Where law agents in a question with a postponed bondholder asserted a lien over title-deeds for their business account with the debtor, and it appeared that they had acquired possession of the titles, not from the debtor but from an assignee of a prior bond, who was also their client, it was held that as their possession was not attributable to the debtor they had no lien for the account due by him.[6]

466. Again, a person may have the custody of a subject without having a right to the possession of it which will entitle him to a lien. Thus a mere servant may have the custody of a subject in the exercise of his duties, but cannot have a lien over it. A butler, for instance, cannot claim a lien over plate in security of his wages, or a clerk a lien over a deed which he is employed to write out.[7] But it may often be difficult to draw the line of distinction between a mere servant, who acts only as the hand of his master, and has no independent possession, and an employee to whom goods are intrusted, and who is in possession of them under the contract on which he is employed.[8]

SECTION 4.—CONTRACTS INCONSISTENT WITH LIEN.

467. As a lien is an implied condition of a contract, it cannot exist if the contract under which possession of an article is obtained contains provisions inconsistent with a right to retain that article. An obvious illustration of this principle is the rule that a party obtaining possession of a subject as means to the performance of an act which he has contracted to do, cannot refuse performance of that act on the plea of a lien over the subject.[1] Thus a law agent, who has received papers to produce in a certain cause, cannot refuse to produce them on the ground that he has a lien over them for his account.[2] So when funds were placed in the hands of a law agent, in furtherance of a scheme which fell through for an extrajudicial settlement with the client's creditors, it was held in the ensuing sequestration that the agent had no lien over these funds for his business account, and must account for them to the trustee.[3]

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[1] *Renny* v. *Rutherford*, 1840, 2 D. 676 and 3 D. 1134.

[2] *Gairdner* v. *Milne & Co.*, 1858, 20 D. 565.

[3] *Kinloch* v. *Craig*, 1789, 3 T.R. 119, 783.

[4] *Glendinning's Crs.* v. *Montgomery*, 1745, Mor. 2573; see *Patten* v. *Royal Bank*, 1853, 15 D. 617.

[5] *Lucas* v. *Dorrien*, 1817, 7 Taun. 278.

[6] *National Bank* v. *White & Park*, 1909 S.C. 1308.

[7] *Burns* v. *Bruce & Baxter*, 1799, Hume, 29; *Gladstone* v. *M'Callum*, 1896, 23 R. 783; *Barnton Hotel Co.* v. *Cook*, 1899, 1 F. 1190.

[8] See *Dickson* v. *Nicholson*, 1855, 17 D. 1011.

468. It may also be a condition, express or implied, of a contract that a subject is to be given up at a certain date, or on demand, and in that case there can be no lien. Thus the special confidence which is implied in the contract of deposit has been held to bar a depositary from claiming a lien over the deposit.[4] And where racehorses were left with a trainer under an arrangement whereby the owner received a right to race them whenever he liked, and to select the jockey, it was held that this arrangement was inconsistent with a right in the trainer to detain the horses, and his plea of lien for his charges was repelled.[5] In an American case a carriage-builder agreed to repair a physician's carriage and to take payment in medical attendance. It was held that he had barred himself from claiming a lien over the carriage.[6] The same theory underlies the rule that when a law agent acts for both seller and purchaser of an estate he cannot withhold the title-deeds from the purchaser on the plea that he has a lien over them for an account due by the seller.[7] On this principle also it is held in England that if a contract for the performance of services with respect to certain property fixes the date of payment at a time after that fixed for redelivery of the property, there can be no lien, even if the owner of the property is bankrupt at the date fixed for redelivery.[8] Thus if a charter-party provides for the payment of a certain sum in lieu of freight, at a certain time after the delivery of the cargo, the captain cannot refuse delivery to the consignee or his representatives in bankruptcy, even, apparently, although a lien for freight is expressly provided.[9] It would seem doubtful whether these cases would be followed in Scotland if the person demanding delivery were bankrupt.

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[1] *Borthwick* v. *Bremner*, 1833, 12 S. 121; *Stewart* v. *Bisset*, 1770, Mor. App. *voce* "Compensation," No. 2.

[2] Bell's Prin., s. 1439.

[3] *Middlemas* v. *Gibson*, 1910 S.C. 577.

[4] *Mackenzie* v. *Newall*, 1824, 3 S. 206.

[5] *Forth* v. *Simpson*, 1849, 13 Q.B. 680.

[6] *Morrill* v. *Merrill*, 1886, 64 N.H. 71, 6 Atl. Rep. 602, cited in Jones on Liens, s. 748.

[7] *Drummond* v. *Muirhead & Guthrie Smith*, 1900, 2 F. 585; *Lochee Sawmill Co., Liquidators of*, v. *Stevenson*, 1908 S.C. 559; and see LAW AGENT, p. 22, *ante*.

[8] *Crawshay* v. *Homfray*, 1820, 4 Barn. & Ald. 50; *Kirchner* v. *Venus*, 1859, 12 Moo. P.C.C. 361; *Fisher* v. *Smith*, 1878, 4 App. Cas. 1.

[9] *Foster* v. *Colby*, 1858, 28 L.J. Ex. 81.

SECTION 5.—LIEN EXCLUDED BY EXPRESS SECURITY.

469. If a person, on obtaining possession of any subject under a contract, stipulates for an express security over it for a particular debt, the maxim *conventio vincit legem* applies, and his rights over it must be determined by his contract, and cannot be enlarged on a plea of lien. Thus if a subject is conveyed expressly in security of a particular debt, it cannot be retained, at least in a question with other creditors of the owner, to cover debts for which it was not impledged.[1] In an appeal from a West Indian Court, where it was proved that by West Indian law the consignee of goods from a plantation had a lien over the plantation in security of bills accepted for the consignor, it was held that a consignee who had taken an express security had waived his right of lien.[2] In that case Lord Westbury explained the law on the point in the following terms: "Lien is not the result of an express contract; it is given by implication of law. If, therefore, a mercantile relation, which might involve a lien, is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of parties for security excludes lien, and limits their rights by the extent of the express contract that they have made, *Expressum facit cessare tacitum.*"[3] An exception to this rule, however, exists in the case of those employments to which a general lien is conceded, when a lien may be held to exist even over a subject expressly pledged for a particular debt. Thus a banker may assert a lien for his general balance over securities lodged by his customer to cover a particular debt, if there was nothing in the contract directly negative of such a right.[4] The same rule applies to a stockbroker.[5]

SECTION 6.—POSSESSION MUST HAVE BEEN OBTAINED BEFORE BANKRUPTCY.

470. The subject over which a lien is claimed must have been placed in the possession of the claimant before the bankruptcy of the person for whose debt the lien is claimed. On bankruptcy the estate passes to the trustee, and a person obtaining possession of part of that estate from the bankrupt could not maintain any right in security over it in a question with the trustee.[6] If, however, the trustee takes no objection to the lien, the bankrupt, on being retrocessed in his estates, cannot object to it. In a case where a factor was employed to collect rents, and authorised to retain them to meet an advance he had made to the proprietor, he collected certain rents after an application for the sequestration of the proprietor had been made, and, applying them to meet his advances, made no claim in the sequestration. The trustee took no objection to this course. Ultimately the bankrupt, who had been discharged on a composition and retrocessed in his estate, claimed the amount of the rents collected from the factor, on the plea that the debt due to him had been extinguished by the sequestration, and that the factor had no right to retain rents which he had obtained after the bankruptcy. It was held that, whether the trustee could or could not have objected to the factor's claim of retention, the bankrupt had no title to do so.[1]

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[1] *National Bank* v. *Forbes*, 1858, 21 D. 79.

[2] *In re Leith's Estate*, 1866, L.R. 1 P.C. 296.

[3] *Ibid.*, at p. 305.

[4] *Robertson's Tr.* v. *Royal Bank of Scotland*, 1890, 18 R. 12; *National Bank of Scotland* v. *Dickie's Tr.*, 1895, 22 R. 740; *Jones* v. *Peppercorne*, 1858, John. 430. See BANK, Vol. II., p. 54, *ante*.

[5] *In re London* v. *Globe Finance Corporation*, [1902] 2 Ch. 416.

[6] Bell, Com. ii. 89; *Dickson* v. *Nicholson*, 1855, 17 D. 1011; *Meldrum's Tr.* v. *Clark*, 1826, 5 S. 122.

471. It is a more difficult question whether a lien can be asserted over a subject which has been placed in the possession of a creditor within sixty days of the bankruptcy of the debtor, for any debt beyond a charge for work performed on the article over which the lien is asserted. It has been held that a bleacher, who had a lien over each parcel of goods sent to him for the balance of the bleaching account due by his customer, was entitled to retain goods sent within sixty days of the bankruptcy of the customer.[2] But this decision proceeded on the ground that the goods in question were sent in the ordinary course of trade, and it is probable that if a debtor, within sixty days of his bankruptcy, should place part of his property in the possession of a creditor who was entitled to a general lien (for instance, his law agent), the transaction would be reducible under the Act 1696, c. 5, as a security for prior debts.

SECTION 7.—LIEN IN QUESTIONS WITH TRUE OWNER OF ARTICLE.

472. Where a lien is claimed over an article in respect of a contract with a party who was at its date lawfully in possession of the article, and the question is raised with the owner after the possessor's right to possess has been terminated, the party asserting the lien cannot succeed unless he can shew that the possessor, in subjecting the article to the lien, had the express, ostensible, or implied authority of its owner. Cases of actual and express authority raise no question beyond the construction of the terms in which it was given. Of cases of ostensible authority probably the most important is that of a mercantile agent in possession of goods with the consent of the owner. By s. 2 of the Factors Act, 1884,[3] it is provided that "any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same, provided that the person taking under the disposition acts in good faith, and had not at the time of the disposition notice that the person making the disposition had not authority to make the same." It has been held that this section gives a statutory title, irrespective of the custom in any particular trade.[1] Similar statutory provisions apply to a person who has bought or agreed to buy goods, and is in possession of them with the consent of the seller.[2] It can hardly be doubted that the statutory phrase "other disposition" is wide enough to cover a lien.

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[1] *Stevenson, Lauder & Gilchrist* v. *Macbrayne*, 1896, 23 R. 496.

[2] *Anderson's Tr.* v. *Fleming*, 1871, 9 M. 718.

[3] 52 & 53 Vict. c. 45, extended to Scotland by the Factors (Scotland) Act, 1890 (53 & 54 Vict. c. 40).

473. In cases of ostensible authority to which these statutory provisions do not apply, it does not necessarily follow that because a party has ostensible authority to pledge he has ostensible authority to create a valid lien. Where a broker lodged with a bank securities belonging to clients, and the evidence disclosed the fact that the bank knew these securities were not his own, it was held that they might nevertheless keep them in security of a debt for which they were expressly pledged, as they were entitled to assume that the broker had his client's authority so to pledge them, but that they could not retain them, on the plea of general lien, to cover the balance due on the broker's banking account, as they were not entitled to assume that he had any authority from his clients to subject them to a lien for his general account.[3] And there is no general rule that mere possession of goods, derived from such contracts as hire, pledge, or carriage, gives the possessor any ostensible authority to dispose of the goods or to subject them to a lien. In *Mitchell* v. *Heys* [4] A. let on hire to a calico printer certain copper rollers, on an agreement that they should be marked with his name, and that, in the event of their being placed in the hands of any third party, the receipt should bear that they were "received from A." The calico printer sent his cloth, with the rollers, to be printed by B., to whom he represented that the rollers were his own property. On the bankruptcy of the printer it was held that B. was not entitled to a lien over the rollers for a balance on the account due by the bankrupt in a question with A. on the general ground, quoted by Lord Kinnear from a judgment of Lord Herschell, "that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner no title is acquired against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the party taking it can shew that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so." [5]

474. While, however, the general rule is that mere possession of an article infers no ostensible authority to dispose of it in any way, there may be cases where the contract under which possession is obtained may give the possessor implied authority to deal with the article in such a way as to create a lien over it. Thus, while a hirer, or pledgee, has no ostensible authority to dispose of the article, and would confer no title upon a purchaser, yet if the terms of the contract of hire or pledge impose upon him, expressly or by implication, the obligation to keep the article in repair, he is impliedly authorised to get it repaired on the ordinary terms, which will in most cases include a lien in favour of the party who executes the repairs. And that lien will be valid in a question with the owner of the article. So the hirer of a motor, who was bound to keep it in repair, was held to be invested with an implied authority to subject it to a lien for repairs—a lien which would be valid in a question with the owner.[1] The express provision that the article is not to be subjected to a lien raises a question not yet definitely settled. In *Lamonby* v. *Foulds*[1] the pursuer had supplied B. with a motor lorry on hire-purchase terms. B. was taken bound to keep the lorry in repair, with the proviso "but this shall not authorise the hirer to create any lien thereon for repairs." B. sent the lorry for repairs to the defenders, who had no notice, and made no inquiries, as to the nature of his right or interest in it. B. failed to pay the instalments, and the pursuer obtained decree against him for delivery of the lorry. It was held that the pursuer was entitled to recover the lorry from the defenders, and that the latter could not assert, in a question with him, any lien for the repairs. Any implied authority which the terms of the contract might confer upon B. was excluded by the express provision forbidding the creation of a lien, and the mere possession of the lorry did not involve any ostensible authority to subject it to a lien. In a subsequent case in England, on very similar facts, and on a contract whereby the hirer was forbidden to subject the vehicle to a lien, though bound to keep it in repair, it was held that the repairer's lien was valid in a question with the owner.[2] *Lamonby* v. *Foulds* was not cited, and the opinions leave it doubtful whether the decision was based on ostensible or implied authority.

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[1] *Oppenheimer* v. *Attenborough*, [1908] 1 K.B. 221.

[2] Factors Act, *supra*, s. 9; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 25.

[3] *National Bank* v. *Dickie's Tr.*, 1895, 22 R. 740; and see *Anderson* v. *North of Scotland Bank*, 1901, 4 F. 49; *Cuthbert* v. *Robarts, Lubbock & Co.*, [1909] 2 Ch. 226.

[4] 1894, 21 R. 600.

[5] *London Joint-Stock Bank* v. *Simmons*, [1892] A.C. 201.

SECTION 8.—LIEN CONFINED TO MOVEABLE PROPERTY.

475. It would seem that mere possession of heritable property cannot give the possessor any right to retain it in respect of claims arising under the contract on which the possession was obtained. Thus when a railway had been constructed, and was certified by the Board of Trade as ready for traffic, it was held that the contractors were not entitled to retain possession, or to prevent the railway being opened, in respect that claims arising under the contract were unpaid.[3] As it was put by Lord Justice-Clerk Inglis, "Any notion of a lien or right of retention in heritable subjects of this kind is totally out of the question." And a tenant, when the term of his lease has expired, has no right to remain in possession in security of his claims for any improvements which he may have executed.[1]

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[1] *Keene* v. *Thomas*, [1905] 1 K.B. 136; *Green* v. *All Motors, Ltd.*, [1917] 1 K.B. 625; *Lamonby* v. *Foulds*, 1928 S.C. 89, per Lord Pres. Clyde at p. 95.

[2] *Albemarle Supply Co.* v. *Hind*, [1928] 1 K.B. 307.

[3] *Castle Douglas and Dumfries Rly.* v. *Lee, Son & Freeman*, 1859, 22 D. 18.

SECTION 9.—SPECIAL AND GENERAL LIEN.

476. Liens are usually classed as special and general. A special lien gives a party a right to retain a subject for a debt arising out of a particular contract; a general lien, a right to retain for a balance arising out of a particular course of employment.

SUBSECTION (1).—*Special Lien.*

(i) *Conditions of Right Arising.*

477. It is a general principle of the law of contract that one party is not bound to fulfil his part of the contract unless the other is prepared to perform his.[2] Special lien is the result of the application of this rule to contracts for the performance of work or services. If a person is engaged to perform any labour or operation on a particular piece of property, the obligations of the parties to the contract are: on the one hand, to do the work and return the article; on the other hand, to pay for the work done. The workman is not bound to fulfil his contract by returning the article unless the employer is able to fulfil his contract by paying for the work done. In other words, the workman has a lien over the article in security of the debt due to him for his labour. This has always been recognised as a perfectly general rule in the law of Scotland, where the article over which the lien is claimed is that on, or in respect to, which the labour for which the debt arises has been bestowed.[3] English law restricts the lien to cases where the work in question has added to the value of the subject,[4] but the English law of lien rests rather on custom of trade than on an implied term of the contract, and the question whether additional value has been conferred on the particular article is obviously irrelevant when lien is considered as an incident or counterpart of a mutual contract.

478. The particular cases in which it has been held that a special lien was established are merely illustrations of the general rule that any person performing work or service on an article has a right of lien over it if it has been placed in his possession. Thus a bleacher,[5] a miller,[6] a storekeeper,[7] a shipowner,[8] a carrier,[9] and a ship-carpenter[10] have all been held to have liens over subjects on which they have exercised their respective trades, in security of their charge for their work. A special lien may also exist over an article placed in the hands of a workman, manufacturer, or professional man, as a means by which some work may be performed, even although no work is actually done on the thing itself. Such a right obviously results from the principle that a special lien is an incident of an executorial contract. But it is not admitted in England,[1] and was only recognised in Scotland with some difficulty. In one case it was asserted that a printer could not have a lien over stereotype plates which had been given to him to print from, because he had performed no work upon the plates themselves.[2] In later cases, however, this ground of exception has been abandoned, and the principle has been recognised that a man is entitled to a lien over a subject for a debt if the subject came into his possession in connection with the contract in which that debt was incurred. Thus a firm of accountants, who acted as debt collectors, were held to be entitled to a lien over the business books of a client, which had been placed in their hands to enable them to collect the debts, in respect of their professional account for doing so.[3] In another case this principle was applied to the case of a factor or land-steward, who was held entitled to a lien, in security of his salary and outlays, over papers relating to the estate which had been placed in his hands in the course of his professional duties.[4]

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[1] *Turner* v. *Turner*, 1811, Hume, 854.

[2] Stair, i. 10, 15; Bell's Prin., s. 71.

[3] Stair, i. 18, 7; Ersk. iii. 4, 20; Bell's Prin., ss. 1411, 1419. See opinion of Lord Young in *Miller* v. *Hutcheson*, 1881, R. 489.

[4] Cross on Lien, p. 24; *Orchard* v. *Rackstraw*, 1850, 9 C.B. 698.

[5] *Harper* v. *Faulds*, 1791, Bell's Oct. Cas. 440; *Anderson's Tr.* v. *Fleming*, 1871, 9 M. 718.

[6] *Chase* v. *Westmore*, 1866, 5 M. & S. 180.

[7] *Laurie* v. *Denny's Tr.*, 1853, 15 D. 404.

[8] Bell's Prin., ss. 405, 1423.

[9] *Stevenson* v. *Likly*, 1824, 3 S. 291.

[10] *Ross & Duncan* v. *Baxter & Co.*, 1885, 13 R. 185.

(ii) *Special Lien for Claim of Damages.*

479. In all these cases the debt for which the lien was sustained arose directly out of the contract on which possession was given. A lien has also been sustained for damages for breach of the contract on which possession was given. A. was appointed by a company as sole agent in Scotland for the sale of a carving machine. He was supplied with a machine for exhibition purposes, and the company undertook to supply him with other machines at a fixed price, leaving him to make a profit by selling them at a higher price. In consequence of this contract A. incurred certain expenses in travelling and in fitting up the show machine. For these expenses, according to the contract, the company was not liable. The company, however, failed, and the show machine was sold by a receiver for debenture-holders. A. claimed a lien over it for the expenses he had incurred, and his right to such a lien was sustained. Seeing that, if the provisions of the contract had been carried out according to their terms, he would have had to bear these expenses himself, it is clear that the debt for which the lien was sustained was of the nature of a claim of damages.[5]

480. It would appear that lien covers only the debt, not the expenses of recovering it, if disputed. In *Garscadden* v. *Ardrossan Dry Docks Co.*[6]

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[1] Addison on Contract, 9th ed., p. 802.

[2] *Brown* v. *Sommerville*, 1844, 6 D. 1267.

[3] *Meikle & Wilson* v. *Pollard*, 1880, 8 R. 69; *Findlay* v. *Waddell*, 1910 S.C. 670.

[4] *Robertson* v. *Ross*, 1887, 15 R. 67.

[5] *Moore's Carving Machine Co.* v. *Austin*, 1896, 33 S.L.R. 613.

[6] 1910 S.C. 178.

shipbuilders were in possession of a ship on which they had executed repairs, and asserted a lien for their account. Its amount was disputed. In a question as to the amount to be consigned by the shipowner in order to induce the Court to pronounce an order for the delivery of the ship, it was held to be sufficient to consign the amount of the account as stated by the shipbuilders, and that the latter had no right to insist on an additional sum being consigned to meet any expenses that might be found due to them in their action against the shipowner.

(iii) *Liens of Salvor and Innkeeper.*

481. The special liens of a salvor, for the expense and reward of salvage,[1] and that of an innkeeper, over the luggage of his guest for his bill (see INNKEEPERS), seem to be exceptional cases of lien, which rest rather on custom of trade than on any implied contract.

SUBSECTION (2).—*General Lien.*

(i) *Definition.*

482. The phrase general lien is used to denote two rights of entirely different character. The right of general retention, *i.e.* the right to retain a subject held on a title of property subject to a personal obligation to convey it, is sometimes, but improperly, spoken of as a general lien. This right will be dealt with under the heading RETENTION. Apart from this, a general lien denotes a right to retain a subject, of which the possession has been obtained under a contract, in security of a balance due under previous contracts of a similar character. It rests on a footing entirely distinct from special lien. While it may easily be inferred that a person who has expended labour on a subject has a right to retain that subject until he is paid for his labour, it does not follow that he should have the right to retain it for labour of a similar character expended upon other articles and on former contracts of employment. Such a lien, it has been decided, cannot in the ordinary case be asserted. Thus in the leading case of *Harper* v. *Faulds*[2] it was held that a bleacher could not retain goods sent to be bleached, in security of a bill granted for a balance arising out of a previous course of employment, and on the bankruptcy of the debtor. And a carrier or railway company has been held to have no right to retain goods for a balance due for goods previously carried, although having a lien over each consignment for the charge for carrying it.[3] The general lien of a person in the position of a mercantile factor or agent seems, from the opinions in the House of Lords in a recent case, to be an exception to this, and to rest, like a special lien, on the principle of reciprocal obligation in contract.[1] In other cases a general lien has been sustained where the claim was based on express contract, contract implied by advertisement, or usage of trade.

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[1] *Otis* v. *Kidston*, 1862, 24 D. 419; 57 & 58 Vict. c. 60, s. 544.

[2] *Harper* v. *Faulds*, 1791, Bell's Oct. Cas. 440; *Stevenson* v. *Likly*, 1824, 3 S. 291; *Laurie* v. *Denny's Tr.*, 1853, 15 D. 404; *Anderson's Tr.* v. *Fleming*, 1871, 9 M. 718.

[3] *Scottish Central Rly. Co.* v. *Ferguson*, 1864, 2 M. 781; *Peebles & Son* v. *Caledonian Rly. Co.*, 1875, 2 R. 346.

(ii) *By Express Contract.*

483. By express contract a party may subject goods belonging to him, but in the possession of a third party, to a general lien for all or any debts due by him to the possessor. This may be, in effect, a pledge. But usually the contract is that goods sent to have a certain operation performed upon them shall be subject to a lien for any balance due by the sender in that particular course of employment. Such an arrangement is good in a question with creditors, even if the particular goods retained were sent within sixty days of the bankruptcy of the sender.[2] A stipulation by a railway company that all goods carried by them shall be subject to a general lien for any balance that may be due by the sender cannot be enforced in a question with a consignee, on the ground that it is not "just and reasonable" within the meaning of s. 7 of the Railway and Canal Traffic Act, 1854.[3] It may possibly be valid in a question with the sender, or his trustee in bankruptcy.[4]

(iii) *By Advertisement.*

484. A general lien for a balance on a course of employment may also be raised by advertisement, provided that it can be proved that the person by whom the goods were sent had notice of it. This was decided in a case where the dyers of Manchester publicly advertised that they would not accept goods to be dyed except on the footing of a general lien for any balance that might be due by the customer for goods previously dyed. This was held to be sufficient to establish a general lien in a question with the creditors of a manufacturer who was proved to have had notice of the advertisement at the time when he sent the goods in question to be dyed.[5] Similarly, a notice, sent with every parcel of goods returned, to the effect that all goods are received subject to a lien for the general balance, is sufficient.[6]

(iv) *Usage of Trade.*

485. The ordinary case of general lien rests upon usage of trade. In certain trades and occupations it is well established that such a lien exists, and its limits, in each case, are fixed by decisions. Thus a factor, a banker, a broker, and a law agent are all entitled to liens for any balance due to them by the party employing them in these several capacities. In other trades, general liens, usually covering the balance on transactions of a particular year, have also been recognised. In each case the recognition of such a lien will depend upon proof of a usage in the particular trade, not confined to any particular locality, but followed generally throughout the country. Much weight would now be attached to the fact that the particular trade in question is entitled to a general lien in England; but this is not necessarily conclusive, as a particular usage may be well recognised in England, but unknown in Scotland.[1] The Scottish decisions have recognised a general lien, *i.e.* a lien for the balance due in a particular year, in the case of bleachers,[2] packers,[3] calico printers,[4] and stockbrokers.[5] Storekeepers [6] and scourers [7] have been held to have no general lien, but in each case the decision proceeded on the ground that usage had not been proved. In England it has been held that packers,[8] calico printers,[9] and wharfingers [10] have a general lien, while dyers,[11] fullers,[12] and millers [13] have not. An accountant, though he has a lien over papers placed in his hands for his account for the work in connection with which they were so placed, has probably no general lien for his account incurred in respect of other work.[14]

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[1] *Glendinning* v. *Hope & Co.*, 1911 S.C. (H.L.) 73.

[2] *Anderson's Tr.* v. *Fleming*, 1871, 9 M. 718.

[3] *Scottish Central Rly. Co.* v. *Ferguson*, 1864, 2 M. 781.

[4] See *Mechan & Sons* v. *London and North-Eastern Rly. Co.*, 1911 S.C. 1348.

[5] *Kirkman* v. *Shawcross*, 1794, 6 T.R. 14.

[6] *Anderson's Tr.* v. *Fleming*, 1871, 9 M. 718.

(v) *Limits of General Lien.*

486. The general lien recognised in these and similar trades covers only a balance due on trade operations, not debts arising from other sources.[15] And where a man carries on two trades, in one of which a general lien is recognised, while in the other it is not, he cannot maintain his lien for debts incurred in the exercise of the trade in which the right of lien is not recognised. Nor can he retain goods sent to him in the latter capacity for a balance due to him in the trade in which he has a lien.[16] In *M'Call* an agent employed to purchase goods for export was entitled to charge 3 per cent. on all transactions where he acted as a factor and became liable for the price, and 1 per cent. on transactions where he incurred no liability and acted merely as a broker. He purchased goods for which he incurred no liability, and in respect of which he charged 1 per cent. The principal failed while these goods were still in the agent's hands, and the latter asserted a right of lien over them for a balance arising on transactions in which he had acted as a factor. The plea of lien was repelled, on the ground that the agent could not exercise a factor's lien over goods of which he had obtained possession in the capacity of a broker.

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[1] *Strong* v. *Philipps & Co.*, 1878, 5 R. 770; *Glendinning* v. *Hope & Co.*, 1911 S.C. (H.L.) 73.

[2] *Anderson's Tr.* v. *Fleming*, 1871, 9 M. 718.

[3] *Strong* v. *Philipps & Co.*, *supra*.

[4] *Mitchell* v. *Heys*, 1894, 21 R. 600.

[5] *Glendinning*, *supra*, on grounds which would apply to any form of commercial agency.

[6] *Laurie* v. *Denny's Tr.*, 1853, 15 D. 404.

[7] *Smith* v. *Aikman*, 1859, 22 D. 344.

[8] *In re Witt*, 1876, 2 Ch. D. 489.

[9] *Weldon* v. *Gould*, 1801, 3 Esp. 268.

[10] *Moet* v. *Pickering*, 1878, 8 Ch. D. 372.

[11] *Bennett* v. *Johnson*, 1785, 2 Chitty, 455.

[12] *Rose* v. *Hart*, 1818, 8 Taun. 499.

[13] *Ex parte Ockenden*, 1754, 1 Atk. 234.

[14] *Findlay* v. *Waddell*, 1910 S.C. 670, per Lord Johnston.

[15] *Houghton* v. *Mathews*, 1803, 3 B. & P. 485.

[16] *M'Call & Co.* v. *Black & Co.*, 1824, 2 Sh. App. 188; *Largue* v. *Urquhart*, 1883, 10 R. 1229.

SECTION 10.—RIGHTS OF HOLDER OF LIEN.

487. A factor has a general power to sell goods placed in his hands, or to pledge them, and thus to satisfy the debt covered by his lien. And an innkeeper has a statutory right to sell any property detained by him under his lien, on the observance of certain rules as to advertisement.[1] With these exceptions, the right conferred by a lien is a right to retain the subject in security of a debt, and not to realise it, even although its retention occasions expense.[2] Thus a banker has no right, in the absence of express authority, to realise securities lodged with him by his customer and subject to his lien, and may be interdicted if he propose to do so.[3] In the case of an ordinary commercial subject, authority to sell to satisfy the debt covered by the lien may be obtained by application to the Sheriff;[4] but it is doubtful whether such a warrant would be granted in the case of subjects—for instance, title-deeds—which are of value only as accessories of a right. A sale may be ordered by the Court at the instance of the owner and against the will of the holder of the lien, reserving to the latter a preference over the price.[5]

SECTION 11.—WAIVER OF LIEN.

488. A lien may be lost by giving up the possession on which it is founded,[6] that is, by returning the subject to the owner. It is doubtful whether the principle of *North-Western Bank* v. *Poynter*,[7] that a right of pledge may be maintained even although the subject pledged is restored to the pledgor, provided it is restored on a contract which makes the pledgor an agent for the pledgee, would be held to be applicable to a case of lien. Lien may be maintained although the subject is placed in the hands of a third party, as where goods are landed in a dock warehouse, under a stop for freight;[8] and a part of the goods subject to the lien may be given up to the owner without affecting the right of lien over the rest.[9] Thus it was held that a law agent who had a lien over the title-deeds of two separate estates might give up the titles of one of them without barring himself from asserting his lien in a question with creditors holding heritable securities over the other estate.[10]

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[1] 41 & 42 Vict. c. 38; see INNKEEPERS, Vol. VIII., p. 191, *ante*.

[2] *Thames Iron Works Co.* v. *Patent Derrick Co.*, 1860, 1 John. & H. 93.

[3] *Robertson's Tr.* v. *Royal Bank of Scotland*, 1890, 18 R. 12, per Lord M'Laren at p. 20.

[4] *Gibson & Stewart* v. *Brown & Co.*, 1876, 3 R. 328.

[5] *Parker* v. *Brown & Co.*, 1878, 5 R. 979.

[6] Bell, Com. ii. 89.

[7] 1894, 21 R. 513; revd. 22 R. (H.L.) 1.

[8] Bell's Prin., s. 1424; *Renny* v. *Kemp*, 1840, 3 D. 1134.

[9] *Bannatyne* v. *Malcolm*, 15th November 1814, F.C.; *Gray* v. *Wardrop's Tr.*, 1851, 13 D. 963; rev. 1855, 2 Macq. 435; *Mechan & Sons* v. *London and North-Eastern Rly. Co.*, 1911 S.C. 1348.

[10] *Gray*, *supra*.

489. The question whether a creditor waives his lien by taking a bill for his debt is not altogether free from difficulty; but it would seem that while taking a bill in the ordinary course of trade would not affect the lien,[1] a bill taken at an unusually distant date would infer waiver.[2] Where an independent security, such as the acceptance of a third party, is given for the debt, the lien is not necessarily waived. Thus an innkeeper, who had accepted a security of doubtful value for his bill, was held to be entitled to a lien.[3] In an early case in Scotland the same decision was arrived at in the case of a law agent; [4] but in recent cases in England it was held that where a solicitor, whose duty it is to advise his client as to his rights and liabilities, takes from his client a security for costs without explaining that he intends to preserve his lien, the *prima facie* inference is that the lien is abandoned.[5]

SECTION 12.—LIEN OF FACTOR.

SUBSECTION (1).—*Generally.*

490. A factor or mercantile agent has a general lien for the balance due by his principal on factorial transactions, which entitles him to retain all funds or property of the principal that may come into his possession in the course of his employment as factor.[6] This lien has been explained on the ground that a factor usually pledges his own credit, or makes advances, on behalf of his principal, in reliance on consignments which he is in the course of receiving, or of goods which he holds from the principal for sale.[7] It entitles the factor to retain goods purchased on behalf of the principal, or received from the principal for sale, bills, policies of insurance, or shipping documents, as well as all moneys belonging to the principal which have come into his possession as factor.[8] This right may be exercised to secure the salary or commission due to the factor on present or past transactions,[9] advances made on the principal's behalf,[10] guarantees undertaken for him,[11] or expenses incurred by the factor in connection with goods consigned.[12] It cannot, however, be used to secure debts due by the principal before the employment commenced,[13] the price of the goods supplied by the factor as an independent merchant,[14] or a debt due to the factor on some other trade or vocation exercised by him.[15] It is no objection to a plea of lien that the transaction under which the factor obtained the property in question had been closed, and that the principal might have recovered the property if he had chosen to demand it before the debt in respect of which the lien is asserted had been incurred.[1]

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[1] *Gairdner* v. *Milne & Co.*, 1858, 20 D. 565; *Palmer* v. *Lee*, 1880, 7 R. 651; *Anderson's Tr.* v. *Fleming*, 1871, 9 M. 718; *Ex parte Willoughby*, 1881, 16 Ch. D. 604.

[2] *Hewison* v. *Guthrie*, 1836, 2 Bing. N.C. 755.

[3] *Angus* v. *Maclachlan*, 1883, 23 Ch. D. 330.

[4] *Ayton* v. *Colvil*, 1705, Mor. 6710.

[5] *In re Taylor, Stileman & Underwood*, [1891] 1 Ch. 590; *In re Morris*, [1908] 1 K.B. 473.

[6] Ersk. iii. 4, 21; Bell's Prin., s. 1445; Bell, Com. ii. 109.

[7] Bell, Com. ii. 109; and see *Stephens* v. *Creditors of York Buildings Co.*, 1735, Mor. 9140.

[8] *Stephens, supra; Wilmot* v. *Wilson*, 1841, 3 D. 815; *Curtis* v. *Macalpine's Tr.*, 1794, Mor. 2589.

[9] *Sibbald* v. *Gibson*, 1852, 15 D. 217.

[10] *Foxcroft* v. *Devonshire*, 1760, 2 Burr. 931.

[11] Bell, Com. ii. 112.

[12] *Curtis* v. *Barclay*, 1826, 5 B. & C. 141.

[13] *Houghton* v. *Mathews*, 1803, 3 B. & P. 485.

[14] *Miller & Paterson* v. *M'Nair*, 1852, 14 D. 955, per Lord Cockburn.

[15] *M'Call & Co.* v. *Black & Co.*, 1824, 2 Sh. App. 188; *Dixon* v. *Stansfield*, 1850, 10 C.B. 398; *Laurie* v. *Denny's Tr.*, 1853, 15 D. 404.

SUBSECTION (2).—*To Whom Lien Competent.*

491. It would appear that the general lien of a factor is the right or privilege of any kind of mercantile agent whose relationship to his principal involves him in making advances or incurring liabilities on his principal's behalf. Thus in *Glendinning*,[1] where it was held that a stockbroker had a lien over the certificates of shares which he had bought for his client, in security of a debt arising out of a subsequent transaction, Lord Kinnear stated the law as follows: "The principle which I take to be very well settled in the law of Scotland is that every agent who is required to undertake liabilities or make payments for his principal, and who in the course of his employment comes into possession of property belonging to his principal, over which he has power of control and disposal, is entitled, in the first place, to be indemnified for the moneys he has expended or the loss he has incurred, and, in the second place, to retain such properties as come into his hands in his character of agent until his claim for indemnity has been satisfied." [2] So a general lien has been sustained in the case of a land-steward,[3] and of a firm of livery stable-keepers who acted as auctioneers, and were in the habit of making advances to persons placing horses in their hands.[4] A sub-factor may have a lien for advances made on the faith of particular goods, or even for a general balance due by the factor, if he acted in ignorance of the existence of the principal.[5]

SUBSECTION (3).—*Extent of Lien.*

492. The lien of a factor may extend not only over goods placed in his possession, but also over the price due by the purchaser for goods sold by him. This will be held if the price is payable to the factor, or if he obtains bills for it, blank indorsed, or if he has a general power to receive payment for goods sold.[6] The right operates by entitling the factor to claim the price from the purchaser, in preference to the trustee in the bankruptcy of the principal. But its waiver is inferred if the factor consent to a bill being drawn in favour of the principal.[7]

493. A factor is not entitled to stop goods *in transitu* in order to preserve his lien.[8] Nor can he retain goods against a purchaser from him who has paid the price to the principal. Thus where a factor sold on a *del credere* commission and guaranteed the purchaser's bill for the price, and the purchaser failed, it was held that the factor could not retain the goods in a question with the purchaser's trustee in bankruptcy, after the principal had accepted a composition on the bill given for the price.[1]

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[1] *Glendinning* v. *Hope & Co.*, 1911 S.C. (H.L.) 73, at p. 75.

[2] 1911 S.C. (H.L.) at p. 78.

[3] *Pearson* v. *Murray*, 1672, Mor. 2625; cp. *Stevenson, Lauder & Gilchrist* v. *Macbrayne*, 1896, 23 R. 496.

[4] *Miller* v. *Hutcheson*, 1881, 8 R. 489.

[5] *Ede & Bond* v. *Findlay, Duff & Co.*, 15th May 1818, F.C.; *Mildred* v. *Maspons*, 1883, 8 App. Cas. 874.

[6] Bell, Com. ii. 111.

[7] *Miller & Paterson* v. *M'Nair*, 1852, 14 D. 955.

[8] Bell, Com. ii. 89.

SUBSECTION (4).—*Lien Excluded by Specific Appropriation.*

494. A factor's lien is excluded by the specific appropriation of goods sent to him—that is, he is not entitled to disregard directions which form the conditions upon which he obtains possession of goods, and keep them to meet a general balance. Thus if goods are sent to a factor to be applied by him to the payment of particular creditors, he has no lien over them even although the diligence of general creditors, or the bankruptcy of the principal, interfere to prevent these directions from being carried out.[2] But bills drawn upon the factor in favour of a third party, and bearing, on the face of them, a reference to a particular cargo, do not infer a specific appropriation of the cargo to the payee of the bills, and the factor, if he has received the cargo, and the principal is bankrupt and indebted to him, is entitled to refuse to accept the bills, and maintain a right of lien over the cargo.[3]

SECTION 13.—VENDOR'S LIEN.

495. A new form of lien has been established by the Sale of Goods Act, 1893. Sec. 41 of that Act provides as follows: "(1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely: (*a*) where the goods have been sold without any stipulation as to credit; (*b*) where the goods have been sold on credit, but the term of credit has expired; (*c*) where the buyer has become insolvent. (2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent, or trustee, or custodier for the buyer." This lien may be exercised notwithstanding part delivery of the goods, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien (s. 42). The lien is lost by delivery of the goods to the carrier or other custodier for the purpose of transmission to the buyer, without reserving the right of disposal of the goods, or by the buyer or his agent obtaining lawful possession of the goods, or by waiver of lien (s. 43 (1)). But it is not lost by the seller obtaining judgment or decree for the price of the goods (s. 43 (2)). The word lien is defined in the Act as, in Scotland, including right of retention (s. 62 (1)).

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[1] *Stirling & Son* v. *Duncan*, 1823, 1 Sh. App. 389; see also *Scott & Neill* v. *Smith & Co.* 1883, 11 R. 316.

[2] *Walker* v. *Birch*, 1795, 6 T.R. 258; Bell, Com. ii. 110.

[3] *Brown, Shipley & Co.* v. *Kough*, 1884, 29 Ch. D. 848.

496. The effect of the Act is, in this as in some other particulars, to replace the common law of Scotland in regard to contracts of sale by the English law. At common law in Scotland the seller of goods had a right of retention over them, founded on the principle that, as the property in the goods did not pass to the purchaser until they were delivered to him, the seller was an undivested owner as long as the goods were in his possession.[1] As under the provisions of the Sale of Goods Act the property in goods sold may now pass to the buyer before delivery, the common-law right of retention is in many cases inapplicable, and the right of lien introduced by the Act must be relied on. The incidents and limits of this lien will be dealt with under the subject of SALE, but it may here be pointed out that the rights of an unpaid seller under his lien are wider than those of the ordinary holder of a lien. A purchaser from him will obtain a valid title to the goods in a question with the buyer (s. 48 (2)), while, if the goods are of a perishable nature, he is entitled to resell them if the buyer, after notice of the intention to resell, does not pay or tender the price within a reasonable time (s. 48 (3)).

SECTION 14.—LIEN OF TRUSTEE.

497. A trustee has a lien over the trust estate in security of any expenses he has been put to, or obligations he has incurred, on behalf of the trust. He is thereby entitled to retain the trust estate under his charge, even although all the trust purposes have been fulfilled, until he is indemnified for such expenses, or relieved from such obligations.[2] In spite of one case, very briefly reported,[3] it would appear that the trustee under a private trust deed for creditors, who has made advances on behalf of the trust, has a lien over the trust estate, in a question with the trustee in a subsequent sequestration, in security of these advances, provided that his title to the subjects forming the trust estate had been duly completed.[4] In the case last cited the lessee of a farm assigned his whole estate, heritable and moveable, to a trustee for the benefit of his creditors. The lease was not assignable, and the landlord's consent to the assignation was not obtained. The lessee remained in possession, but the trustee paid the rent and the seed and labour necessary for sowing the crop. Before the crop was reaped the lessee was sequestrated. It was held that the trustee in the private trust, as he had never had any possession, had no right to a preferential ranking for his advances, either over the stock and implements or over the growing crop. When the trustee under a trust deed for creditors gave up the trust deed to a judicial factor, under reservation of his lien, it was held that he had a preferential right over the estate as realised, postponed to the expense and remuneration of the judicial factor.[1] A trustee is not entitled to use his right of lien as a means of unnecessarily prolonging the trust after its purposes have been fulfilled, unless the obligations he has undertaken are reasonably likely to result in liability.[2] The lien covers expenses incurred on behalf of the trust, but not necessarily advances made by the trustee, unless the estate was *lucratus* thereby.[3]

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[1] *M'Ewen* v. *Smith*, 1847, 9 D. 434; affd. 1849, 6 Bell's App. 340; *Distillers' Co.* v. *Russell's Tr.*, 1889, 16 R. 479; *Paton's Trs.* v. *Finlayson*, 1923 S.C. 872. See SALE; RETENTION.

[2] Bell's Prin., s. 1998; Bell, Com. ii. 117; *Elliott's Trs.* v. *Elliott*, 1828, 6 S. 1058; *Brodie* v. *Wilson*, 1837, 15 S. 1195.

[3] *Dall* v. *Drummond*, 1870, 8 M. 1006.

[4] *MacGregor* v. *M'Lennan's Trs.*, 1898, 25 R. 482; *Mess* v. *Sime's Tr.*, 1898, 1 F. (H.L.) 22.

498. Where the trustee has allocated the estate among the various beneficiaries, but not actually distributed their respective shares, he cannot exercise his lien over the share allocated to one beneficiary for expenses incurred in relation to the estate allocated to any other.[4] This is of importance where a trustee carries on a trade, or holds shares involving liability, for the benefit of one particular beneficiary. Thus where the share allocated to one beneficiary included shares in the City of Glasgow Bank, and the trustee remained on the register and incurred liability as a shareholder, it was held that his claim for reimbursement affected only the shares of that particular beneficiary, and could not be asserted against the rest of the trust estate.[5]

SECTION 15.—LAW AGENT'S LIEN.

See LAW AGENT.

SECTION 16.—BANKER'S LIEN.

See BANK.

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[1] *Miln's Judicial Factor* v. *Spence's Trs.*, 1927, S.L.T. 425.

[2] *Henderson* v. *Norrie*, 1866, 4 M. 691.

[3] *Brown* v. *Meek's Trs.*, 1896, 4 S.L.T. 46.

[4] *Robinson* v. *Fraser's Tr.*, 1880, 7 R. 694; revd. 1881, 8 R. (H.L.) 127.

[5] *Robinson, supra.*

LIEUTENANT (LORD).

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SECTION 1.—HISTORY.

499. Early Acts refer to an officer called the Lieutenant or King's Lieutenant, who performed certain functions in counties, principally connected with the arrest of rebels and holding of "weapon shawinges." [1] The lieutenant is first referred to as Lord Lieutenant in a statute of James II.[2] The Militia (Scotland) Act, 1802,[3] which superseded the former Militia Acts, authorised His Majesty to appoint lieutenants of counties, stewartries, cities, and places mentioned in the Act. The lieutenants were authorised to represent the Crown for military purposes and to raise and regulate the militia force. The statute further empowered lieutenants to call out the militia yearly, to appoint deputy lieutenants, and also to appoint colonels and other officers for training the militia. An annual Act was passed suspending the operation of this statute. The provisions which regulate lord lieutenants and deputy lieutenants are now to be found in the Militia Act, 1882.[4] This Act, with the other Militia and Yeomanry Acts, was repealed in 1921,[5] with the exception of the provisions as to lieutenants, deputy lieutenants, and general meetings of lieutenancy. Under the 1882 Act His Majesty is empowered to appoint lieutenants for counties.[6]

SECTION 2.—DEPUTY LIEUTENANTS.

500. The lieutenant appoints deputy lieutenants. Twenty duly qualified persons in a county must be appointed deputy lieutenants, and if so many cannot be found qualified, then all the persons duly qualified. His Majesty approves all appointments as deputy lieutenant, and by his order a lieutenant may be called upon to displace all or any of his deputy lieutenants. A return of all deputy lieutenants is made annually to Parliament. The commission of a deputy lieutenant is not vacated by the lieutenant who granted it ceasing to be a lieutenant.[7] In case of a lieutenant's inability to act, His Majesty may authorise any three deputy lieutenants to act.[1] The lieutenant, with the approbation of His Majesty, may appoint any deputy lieutenant of the county to act for him as vice-lieutenant during his absence or inability to act.[2] The qualifications of a deputy lieutenant formerly prescribed by the 1882 Act [3] are now regulated by the Deputy Lieutenants Act, 1918.[4] They are that (*a*) he must have a place of residence in the county or within seven miles thereof; (*b*) he must be shewn to the satisfaction of a Secretary of State to have rendered worthy service as a member of, or in a civil capacity in connection with, His Majesty's naval, military, or air forces.

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[1] 1438, c. 3; 1481, c. 81; 1483, c. 89; 1489, c. 11.

[2] 1449, c. 10.

[3] 42 Geo. III. c. 91.

[4] 45 & 46 Vict. c. 49, ss. 29 to 36.

[5] 11 & 12 Geo. V. c. 37, s. 4 and Schedule II.

[6] 45 & 46 Vict. c. 49, s. 1.

[7] *Ibid.*, s. 30.

SECTION 3.—DUTIES.

501. The lord lieutenant and his deputy lieutenants have no administrative duties in regard to the local government of a county, although prior to the Local Government (Scotland) Act, 1889,[5] the lord lieutenant was *ex officio* a member of the Police Committee [6] and of the Local Authority under the Contagious Diseases (Animals) Act, 1878.[7] Under the Territorial and Reserve Forces Act, 1907, the lord lieutenant is entitled to be president of the County Association, which is the body entrusted with the civil and financial administration of the Territorial Army within the district, except during periods of annual training in camp, of embodiment, and of actual military service.[8]

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[1] 45 & 46 Vict. c. 49, s. 31.

[2] *Ibid.*, s. 32.

[3] *Ibid.*, s. 33.

[4] 8 & 9 Geo. V. c. 19.

[5] 52 & 53 Vict. c. 50.

[6] 20 & 21 Vict. c. 72, s. 2.

[7] 41 & 42 Vict. c. 74, ss. 68, 69.

[8] 7 Edw. VII. c. 9, s. 1 (3).

LIFE INSURANCE.

See INSURANCE (LIFE).

LIFE, PRESUMPTION OF.

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LIFERENT AND FEE.

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SECTION 1.—DEFINITIONS.

502. The right to enjoy a subject and its fruits during life without wasting its substance, corresponding to the Roman *usufructus*, is termed the "liferent," the fuller right of unlimited property, the "fee," of a subject. This is the proper use of the term "fee," but the rights of fee and liferent are commonly spoken of as existing simultaneously in different persons over the same property, the "liferenter" being the person entitled to the use of the subject and its fruits, the "fiar" he whose property is burdened with the liferent. The right of the fiar, using the word in the secondary sense, is a limited one, comprising only certain rights over the subject during the subsistence of the liferent, with, however, the reversionary right to its complete enjoyment after the liferent has expired.

SECTION 2.—FRUITS.

503. Fruits are natural, industrial, and civil. Natural fruits, by our usage, include all fruits which, like trees, shrubs, and natural grasses, grow without the aid of human industry and cultivation. On the principle of accession they are deemed *partes soli*, and accordingly, when not yet separated from the ground (called by the Romans *fructus pendentes*), they pass, on the death of a proprietor, to his heir, and on the sale of lands, to the purchaser.

GENERAL AUTHORITIES.—Stair, ii. 3, 41; ii. 6, 10; Ersk. iii. 8, 35, 36; Bell, Com. ii. 1, 5, 6; Bankt. ii. 3, 9; iii. 5, 47; Bell's Prin., ss. 1709 *et seq.*, 1953 *et seq.*; Fraser, Husband and Wife, 2nd ed., pp. 1427-55; M'Laren on Wills, pp. 606-22, 628-30; Craigie, Heritable Rights, 2nd ed., pp. 550, 575, 643. See also VESTING IN SUCCESSION.

504. Industrial fruits are those which are produced by the annual industry and culture of man, as wheat, barley, or turnips. These fall not within the rule applied to natural fruits, but are deemed a manufacture from the seed, and so, even before separation, go with the property of the seed and labour to the sower, on the principle *messis sementem sequitur.*[1] In liferent of lands, the general rule is that the liferenter is entitled to the use of all natural and industrial fruits,[2] but this rule does not apply to trees, with certain exceptions which are dealt with below.[3] The right of the liferenter to natural fruits not yet separated from the ground ceases with his death; the right to the industrial crop then growing passes to his executors.[4] While trees and shrubs are, as a rule, held to be natural fruits, there is authority for the view that plants and shrubs in a nursery garden, kept for sale, are to be included in the category of industrial fruits.[5] With regard to artificial hay, it was formerly held, in questions between the heir and executor of a deceased proprietor,[6] and a fiar and the representatives of a life tenant,[7] that hay of the second crop, from grass seeds sown with white crop, was heritable before separation from the ground; but it has more recently been decided that, as between landlord and waygoing tenant, hay from grass seeds sown with the penultimate white crop is an industrial crop,[8] and the authority of the older decisions thus appears to be doubtful.

505. Fruits, both natural and industrial, when separated from the subject which produced them (*fructus percepti*), are moveable property, and, in conformity with the rule applicable to property in moveables, are presumed to belong to the person in possession of the principal subject at the date of separation, though this presumption may be rebutted by evidence that the possessor was *in mala fide.* Such fruits, being *in bonis* of the proprietor or liferenter, do not pass on the sale of lands to the purchaser,[9] nor on the expiry of a liferent to the fiar.

506. Civil fruits are the rents and profits of subjects not in the immediate occupation of the owner, liferenter, or *bona-fide* possessor. In liferent of heritage, the general rule is that the liferenter has the right to use all the civil fruits of the subject liferented,[10] but to this rule there are certain exceptions. Thus terce does not include a right to feu-duties,[11] nor has a liferenter by constitution a right to casualties.[12] Again, while all liferenters have a right to such minerals as are necessary for the use of the mansion-house and estate, the right of a simple liferenter extends no further,[1] whereas a liferenter by reservation has been found entitled to carry on mines which were being worked at the commencement of the liferent.[2]

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[1] Stair, ii. 1, 2, 34; Ersk. ii. 1, 14, 26; ii. 2, 4; ii. 6, 11; Bell, Com. ii. 2; Bell's Prin., s. 1473.

[2] Bell's Prin., s. 1045.

[3] Rankine, Land-Ownership, 4th ed., pp. 728, 729; see also para. 513, *infra.*

[4] Ersk. ii. 9, 65; Bell's Prin., s. 1045, and authorities there cited.

[5] *Gordon* v. *Gordon,* 1806, Hume, 1888; *Begbie* v. *Boyd,* 1837, 16 S. 232; *Syme* v. *Harvey,* 1861, 24 D. 202, per Lord Deas at p. 214.

[6] *Sinclair* v. *Dalrymple,* 1744, Mor. 5421; *Wight* v. *Inglis,* 1796, Mor. 5446; but see *Gordon* v. *Gordon, supra.*

[7] *Tweeddale* v. *Somner,* 19th November 1816, F.C.

[8] *Keith* v. *Logie's Heirs and Dr. Young,* 1825, 4 S. 267 (N.E. 272); *Lyall* v. *Cooper,* 1832, 11 S. 96.

[9] Ersk. ii. 1, 14.

[10] Ersk. ii. 9, 56.

[11] *Nisbett* v. *Nisbett's Trs.,* 1835, 13 S. 517.

[12] *Ewing* v. *Ewing,* 1872, 10 M. 678. See para. 517, *infra.*

507. Civil fruits, like natural and industrial, are acquired *perceptione.* Where the payments are not connected with the produce of land, as in the case of profits arising from the daily labour of workmen in fishings, mines, and other industrial pursuits, they are held to accrue *de die in diem*, and this rule has been extended by the Apportionment Acts of 1834 and 1870 to all periodical payments.[3] At common law the rents of lands and houses are deemed to be reaped or *percepti* at the legal terms of payment (*i.e.* Whitsunday and Martinmas) where payment is conventionally postponed, or at the date when payment is actually exigible, if that precede the legal term. In the case of farms, both arable [4] and pastoral,[5] the rent is payable in respect of the crop, and the rent for the crop for each year is legally due, the first half at Whitsunday and the remainder at Martinmas. The like rule holds *quoad* grass parks let for the season, April to December.[6] So also concerning houses, though the rent is payable for possession, the first half-year's rent is legally due at Whitsunday, even though that be the term of entry, and the second at Martinmas.[7] Whitsunday and Martinmas have also been recognised as the legal terms of payment of mineral rents and lordships, at least where these are taken payable according to terms.[8] The common-law rule of apportionment, accordingly, as between liferenter and fiar, where payment is conventionally postponed, is that one-half of the rent payable in respect of the crop or possession of any year vests in the liferenter if he survive the term of Whitsunday, and the remainder if he survive the term of Martinmas.[9]

SECTION 3.—CONSTITUTION OF LIFERENT.

508. Liferents are usually distinguished as legal and conventional. The legal liferents are those implied at common law, viz. TERCE and COURTESY (*q.v.*). Conventional liferents (which are also "legal," in the broad sense of that term) are of two kinds, either (*a*) newly created rights, which are termed liferents by constitution, or simple liferents, or (*b*) those created by conveyance of land or other heritable subjects to one in fee, reserving to the granter the liferent use of such subjects—these are termed liferents by reservation.

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[1] *Dickson* v. *Dickson*, 1823, 2 S. 152 (N.E. 138).

[2] *Eiston* v. *Eiston*, 1831, 9 S. 716. See para. 514, *infra*.

[3] Bell's Prin., s. 1497 ; Ersk. ii. 9, 66 ; 4 & 5 Will. IV. c. 22 ; 33 & 34 Vict. c. 35.

[4] *Campbell* v. *Campbell*, 1849, 11 D. 1426.

[5] *Blaikie* v. *Farquharson*, 1849, 11 D. 1456.

[6] *Swinton* v. *Gawler*, 20th June 1809, F.C.

[7] *Binny* v. *Binny*, 28th January 1820, F.C. ; *King* v. *Jaffray*, 1828, 6 S. 422.

[8] *Weir's Exrs.* v. *Durham*, 1870, 8 M. 725.

[9] But see para. 535, *infra*, as to the effect of the Apportionment Acts upon the common-law rule.

509. The essence of a liferent is that the subjects should be used *salva rerum substantia.* Only such subjects can therefore properly be liferented as are not consumed by use, the right of the liferenter extending to the fruits of the subjects. Thus the subjects proper for a liferent are only heritable subjects and sums of money, the fruits of the latter being the revenues arising from the capital sum. A liferent, however, is admitted over certain other moveable subjects, especially when given as a supplement to the heritable subject on which they are used, such as furniture in a house or the implements and stabling of a farm.

510. A liferent by reservation is made by a conveyance under reservation of his liferent by one in whom the fee is. If the conveyance is by one who is infeft, the liferent depends upon the granter's own infeftment, and remains a real right, the conveyance of the fee being a limitation upon it. If the conveyance is by one who has merely a personal right, he must make that right real in order to enjoy the privileges which are given to a liferenter by reservation, for this right is looked upon as more nearly akin to one of fee than that of the liferenter by constitution, and certain rights over the subject are allowed to the reserved liferenter which are not open to the other. A liferent by constitution is made by a conveyance, whether in a marriage settlement, disposition, or other deed, of an estate to one in liferent and to another in fee, or to several in conjunct fee and liferent. It requires infeftment of the liferenter or of trustees to hold for him to make this right a real one.[1] The liferent right of a conjunct fiar, though a right by constitution, is considered to be more of the nature of a fee than that of the ordinary liferent. The conjunct fiar is accordingly allowed the fuller rights of a liferenter by reservation. Where a liferent was constituted by a disposition, which prohibited the liferenter from "selling, mortgaging, or otherwise disposing of" his interest, and declared that his right should be forfeited in the event of his doing so, it was held that the prohibition was valid,[2] but that it did not strike at the diligence of creditors or the execution by the liferenter of a trust disposition for behoof of his creditors.[3]

511. The creation of successive liferents over the same property has been made illegal in respect of heritable estate by the terms of the Rutherfurd Act,[4] s. 48, and in respect of moveables by those of the Entail Amendment Act, 1868,[5] s. 17. The former provides that after 14th August 1848 "it shall be competent to grant an estate in Scotland limited to a liferent interest in favour only of a party in life at the date of such grant; and where any land or estate in Scotland shall, by virtue of any deed dated on or after the said first day of August 1848, be held in liferent by a party of full age born after the date of such deed, such party shall not be in any way affected by any prohibitions, conditions, restrictions, or limitations which may be contained in such deed, or by which the same or the interest of such party therein may bear to be qualified, and such party shall be deemed and taken to be the fee-simple proprietor of such estate." The Entail Amendment Act has applied to moveable estate practically the same provisions as the above. "It shall be competent to constitute or reserve, by means of a trust or otherwise, a liferent interest in moveable and personal estate in Scotland in favour only of a party in life at the date of the deed constituting or reserving such liferent, and where any moveable or personal estate in Scotland shall, by virtue of any deed dated after the passing of this Act . . . be held in liferent by or for behoof of a party of full age born after the date of such deed, such moveable or personal estate shall belong absolutely to such party." The Court cannot *ex nobile officio* extend these statutory provisions so as to benefit a pupil.[1] Nor do they apply to an annuity.[2] The date of a testamentary or *mortis causa* deed is taken for the purposes of the Act to be the date of the death of the granter, and the date of a contract of marriage is taken to be the date of the dissolution of the marriage (*ibid.*, s. 17). See the Trusts (Scotland) Act, 1921,[3] s. 9, the provisions of which are, by s. 45 of the Conveyancing (Scotland) Act, 1924, extended to deeds dated prior to 31st July 1868, the date of such deeds being deemed to be the date of the passing of the Act last mentioned.

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[1] *Hardie* v. *Mags. of Port-Glasgow*, 1864, 2 M. 746; 36 Sc. Jur. 338.

[2] *Chaplin's Trs.* v. *Hoile*, 1890, 18 R. 27.

[3] *Chaplin's Trs.* v. *Hoile*, 1891, 19 R. 237; see Ersk. ii, 9, 41, 42; Stair, ii. 6, 11; Bell's Prin., ss. 1040, 1041.

[4] 11 & 12 Vict. c. 36.

[5] 31 & 32 Vict. c. 84.

SECTION 4.—RIGHTS OF LIFERENTER.

512. The general rule is that the liferenter has possession of the subject liferented, and takes all its fruits, natural, civil, and industrial, under the limitation that the substance of the property shall not be consumed. He is entitled to take advantage of any increase in value which the property may have acquired between the date of the vesting of the right and the date of his possession,[4] and, conversely, must suffer from any decrease in its value. An exception to this rule has been made where, before the commencement of a liferent, a third party purchasing the estate so burdened has *bona fide* enhanced its value for his own benefit. In such a case the liferenter may either take the annual value of the estate as it stood before the melioration, or possess the whole subject "subject to the annual interest of the melioration."[5]

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[1] *Crichton-Stuart's Tutrix*, 1921 S.C. 840.

[2] *Drybrough's Tr.* v. *Drybrough's Tr.*, 1912 S.C. 939.

[3] 11 & 12 Geo. V. c. 28; 14 & 15 Geo. V. c. 27; *cf.* Bell's Prin., ss. 1707, 1951; *Stewart's Trs.* v. *Whitelaw*, 1926 S.C. 701; *Mackenzie's Trs.* v. *Mackenzie*, 1922 S.C. 404. See *Reid's Trs.* v. *Dashwood*, 1929, S.L.T. 619, for interpretation of the words "born" and "in life" as used in 11 & 12 Geo. V. c. 58, s. 9.

[4] *Campbell* v. *Stirling*, 1666, Mor. 8241; *Mitchell's Crs.* v. *Warden*, 1733, Mor. 8275; *Malcolm* v. *Malcolm*, 1823, 2 S. 514 (N.E. 543).

[5] *Laird* v. *Fenwick*, 1807, Mor. "Liferent," App. No. 3; *Hacket* v. *Watt*, 1672, Mor. 13412; see Bell's Prin., s. 1052; Rankine on Land-Ownership, 4th ed., p. 725.

With regard to what are the proper fruits of heritable subjects, various questions have arisen between fiar and liferenter. The most important of these relate to (1) timber; (2) minerals; (3) rights of superiority.

SUBSECTION (1).—*Timber.*

513. Growing trees are considered *partes soli*, and as such are not available to the liferenter. He may not cut ripe timber even where it has been planted by himself.[1] An exception to this rule is coppice wood, which is cut at regular intervals and allowed to grow again from the root. At one time this exception was only considered to extend, *quoad* liferenters by constitution, to wood laid out in "haggs" or divisions for cutting, one division being cut annually, but the law is now settled that the liferenter may cut coppice wood which arrives at maturity during his liferent: he may not, however, anticipate the period of cutting.[2] Grown timber is only available to the liferenter for the purposes of upkeep of the estate and repair of buildings, notice being given to the fiar before cutting,[3] unless there be a special provision to the contrary in the liferenter's right.[4] A liferenter has a right to the underwood and to ordinary windfalls, but extraordinary windfalls are treated as grown timber. With these exceptions, the fiar has the property and administration of the timber. He will not, however, be entitled to cut down timber so as to impair the amenity, shelter, or comfort of the liferenter's dwelling.[5] Thinning of the woods is included in such administration, and the proceeds belong to the fiar, but the liferenter is entitled to timeous notice of operations on the woods, in order that he may protect his rights.[6]

SUBSECTION (2).—*Minerals.*

514. Minerals, such as coal, lime, etc., are even more distinctly *partes soli*, and belong to the fiar. The liferenter, however, is entitled to so much of them as is required for the purposes of the estate.[7] A fiar working mines and minerals must have regard to the amenity of the manor house and estate and must pay surface damages.[8] To the general rule that minerals belong to the fiar, exceptions have been established in favour of the liferenter, founded on the intention, express or implied, of the granter of the liferent. Thus a widow, who before her marriage was fiar of a freestone quarry, which was kept going during the marriage, was held not to have barred herself from continuing to work the quarry for her own benefit after the death of her husband, notwithstanding the terms of her contract of marriage and of a subsequent deed by which she conveyed the fee to her eldest son, reserving to herself the liferent use and enjoyment of her whole property.[1]

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[1] *Mouswell's Crs.* v. *The Children*, 1683, Mor. 8253; 4 Bro. Supp. 138; *Earl of Dunfermline* v. *Earl of Callander*, 1683, Mor. 8244; *Gray* v. *Seton*, 1789, Mor. 8250.

[2] *Dickson* v. *Dickson*, 1823, 2 S. 152 (N.E. 138); *Tait* v. *Maitland*, 1825, 4 S. 247 (N.E. 253); *Macalister's Trs.* v. *Macalister*, 1851, 13 D. 1239.

[3] *Stanfield* v. *Wilson*, 1683, Mor. 8244; *Earl of Dunfermline* v. *Earl of Callander*, 1683, Mor. 8244; *Dickson* v. *Dickson*, 1823, 2 S. 152 (N.E. 138); *Macalister's Trs.* v. *Macalister*, 1851, 13 D. 1239.

[4] *Dingwall* v. *Duff*, 1833, 12 S. 216; 1834, 12 S. 541.

[5] *Dickson* v. *Dickson*, 1823, 2 S. 162 (N.E. 138); *Tait* v. *Maitland*, 1825, 4 S. 247 (N.E. 253).

[6] *Duchess of Hamilton* v. *Duke of Hamilton*, 1723, Rob. 443; *Tait* v. *Maitland*, *supra*; see Ersk. ii. 9, 58; Bell's Prin., s. 1046; Rankine on Land-Ownership, 4th ed., p. 728; Rankine on Leases, 3rd ed., p. 79.

[7] *Lady Lamington* v. *Her Son*, 1682, Mor. 8240; *Preston* v. *Preston*, 1677, Mor. 8242; *Swinton* v. *Roxburgh*, 1st February 1814, F.C.; *Dickson* v. *Dickson*, 1823, 2 S. 152 (N.E. 138).

[8] *Dickson* v. *Dickson*, *supra*.

515. A bequest of "all" the testator's lands and heritages in a *mortis causa* general disposition and conveyance to one in liferent and another in fee has been held to entitle the liferenter to the proceeds of a 999 years' mineral lease.[2] A conveyance of the liferent of the *universitas* of an estate has been held to carry to the liferenter the income derived from a clayfield.[3] The rents of a coalfield, similarly conveyed, where there was no immediate danger of exhaustion, have been treated in like manner.[4] But where a proprietor conveyed the *universitas* of an estate, including mineral leases which had only five years to run, to trustees, with a direction to pay the free annual income of the residue of his estate to his widow, and to invest the residue for certain purposes, it was held that the profits of the mineral leases were not annual income, but only part of the residue, the interest on which was to be paid to the widow.[5] Somewhat similar circumstances were considered in the case undernoted,[6] where a majority of judges held that the intention was to treat proceeds of mineral workings as annual income, and that decision was followed in another case.[7]

516. Generally, it seems to have been established that where a mineral field has been opened up and made part of the fruits of the soil, or has provided an income during the lifetime of the testator, the liferenter is entitled to continue to have these fruits as part of the free income of the estate.[8] But where it has not been opened up during the lifetime of the testator, but has become a source of revenue since his death, the liferenter is not entitled to enjoy it.[9] In such a case the rents and lordships fall to be accumulated for the fiar, the interest only on the sum so accumulated being payable to the liferenter.[10] Where, however, a mineral field had been let by a testator during his life for a term of years, but had never been worked by the lessees, who took advantage of a break in the lease to end it, it was held that the trustees had power to enter into a new lease of the subjects, and that the rents and lordships thereof fell to be paid to the liferenters.[1] A bequest by a husband of the "free annual proceeds of my estate and of minerals therein" to his wife in liferent, was held to give the widow right to the proceeds of workings abandoned as unprofitable during the testator's life,[2] and to entitle her to the rents and lordships of minerals which had not been worked or let during the lifetime of the testator but which had been let by his trustees since his death.[3]

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[1] *Eiston* v. *Eiston*, 1831, 9 S. 716.

[2] *Waddel* v. *Waddel*, 21st January 1812, F.C.

[3] *Guild's Trs.* v. *Guild*, 1872, 10 M. 911.

[4] *Wardlaw* v. *Wardlaw's Trs.*, 1875, 2 R. 368.

[5] *Ferguson* v. *Ferguson's Trs.*, 1877, 4 R. 531.

[6] *Strain's Trs.* v. *Strain*, 1893, 20 R. 1025.

[7] *Mein's Trs.* v. *Mein*, 1901, 3 F. 994.

[8] *Campbell's Trs.* v. *Campbell*, 1882, 9 R. 725; affd. 1883, 10 R. (H.L.) 65; 8 App. Cas. 641; *Nugent's Trs.* v. *Nugent*, 1898, 25 R. 475; revd. 1899, 2 F. (H.L.) 21.

[9] *Campbell's Trs.* v. *Campbell*, *supra*; *Ranken's Trs.* v. *Ranken*, 1908 S.C. 3; *Naismith's Trs.* v. *Naismith*, 1909 S.C. 1380.

[10] *Naismith's Trs.* v. *Naismith*, *supra*; *Galbraith* v. *Minister of Bo'ness*, 1893, 21 R. 30.

SUBSECTION (3).—*Rights of Superiority.*

517. Where the liferent is one of the superiority or *dominium directum* of an estate, the liferenter, whether by constitution or by reservation, has a right to the feu-duties and ground-annuals as the civil fruits of the subject. As regards the entry of heirs and singular successors, and the right to casualties, the following differences exist: The liferenter by reservation, or conjunct fiar, had the right to enter heirs and singular successors.[4] This right was confined [5] to the privilege of granting charters of novodamus, writs of *clare constat* and writs of acknowledgment. But the more important right to the casualties of superiority or to a grassum under a contract of ground-annual still remains to liferenters by reservation and conjunct fiars. Liferenters by constitution never had the right, unless it were expressly given,[6] to enter heirs and singular successors, and so were not entitled to casualties; these went to the fiar.[4] The ratio of the decision in *Ewing's* case [7] was that under the law, as it then stood, the casualty arose as a consideration to the superior for the fulfilment by him of the duty imposed on him of giving an entry to his vassal's heir. That ratio, however, was made inapplicable by the provisions of the Conveyancing Act, 1874,[8] under which infeftment implies entry, so that the superior has now no duty in the matter.

518. A duplicand of feu-duty which was payable once in nineteen years was held not to form part of the "whole free annual income" of an estate; [9] but where duplicands of feu-duties were payable by different vassals at recurring periods, and some of them became due every year, it was held that the average annual amount fell to be included in calculating the annual income or produce of the estate.[10] The question is now "well settled by authority to the effect that duplications of feu-duties and casualties (whether they are properly so termed or not) form part of the income of the estate of which the superiority forms a part.[1] It is immaterial whether the superiorities were part of the testator's estate at his death or purchased subsequently.[2] In a question between a fiar and the executrix of a liferenter it was held that casualties and duplicands due and unpaid, but in respect of which a demand for payment had been made prior to the death of the liferenter, belonged to him and fell to be paid to his executrix, but those in respect of which no demand had been made prior to the death of the liferenter fell to the fiar.[3]

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[1] *Dick's Trs.* v. *Robertson*, 1901, 3 F. 1021; *Naismith's Trs.* v. *Naismith*, 1909 S.C. 1380.

[2] *Baillie's Trs.* v. *Baillie*, 1891, 19 R. 220.

[3] *Baillie's Trs.* v. *Baillie*, 1898, 6 S.L.T. 31; see Ersk. ii. 9, 57; Bell's Prin., s. 1042; Rankine on Land-Ownership, 4th ed., p. 730.

[4] *Clark* v. *Wemyss*, 1596, Mor. 8251; *Crawfordjohn* v. *Laird of Glaspen*, 1611, Mor. 8252.

[5] 37 & 38 Vict. c. 94, s. 4 (1).

[6] *Gibson-Craig* v. *Cochran*, 1838, 16 S. 1332.

[7] *Ewing* v. *Ewing*, 1872, 10 M. 678.

[8] 37 & 38 Vict. c. 94, s. 4 (2).

[9] *Gibson* v. *Caddall's Trs.*, 1895, 22 R. 889.

[10] *Lamont Campbell* v. *Carter Campbell*, 1895, 22 R. 260.

SUBSECTION (4).—*Title-deeds.*

519. A liferenter by reservation or conjunct fiar has a right to the custody of the title-deeds, a right which the liferenter by constitution has not, under the obligation of making them forthcoming to the other party when necessary.[4]

SUBSECTION (5).—*Power to Lease or Feu.*

520. As the liferenter's right is limited to the term of his own life, he cannot grant a lease valid beyond that period, unless with the consent of the fiar, or where special powers in this respect are given.[5] Where a liferentrix of certain lands was given "absolute control and management" thereof, "without any interference from the heir who is appointed to succeed after her death," it was held that this did not give her other than the ordinary powers of a liferenter with respect to the granting of leases.[6] A liferenter of superiority cannot grant a feu to be valid beyond the term of the liferent; and the concurrence of the fiar will not give validity to such a feu-right unless the fiar is infeft, except in so far as the fiar and his heirs are barred *personali exceptione.*[7] Where there was some doubt whether a right was one of fee or of liferent and fiduciary fee, power was given to feu on the ground that the parties were either fiars or entitled as fiduciary fiars for their "heirs and assignees" to reasonable powers of administration.[8]

SECTION 5.—LIABILITIES OF LIFERENTER.

SUBSECTION (1).—*For Taxes, Burdens, etc.*

521. "Liferenters as they are entitled to the profits, so must they bear the burdens attending the subject liferented," [9] such as public taxes, feu-duties, minister's stipend, etc., annually due from the lands,[1] unless these are specially excepted by the terms of the grant.[2] The expense of rebuilding a manse, or repairing a manse and parish church, was held to be a burden on the fiar and not on the liferenter, as these are not of the nature of annual expenditure, but rather burdens on the capital of the estate.[3] These rules are subject to exception where a different intention is expressed by the terms of the deed constituting the liferent. Thus where the right is merely one of occupancy, the party enjoying it is liable for assessments in respect of occupancy only and not for feu-duty nor rates payable in respect of property. The right has been held to be one of occupancy only and not a proper liferent where such expressions have been used as, to give one "the use of my house . . . with the whole furniture and effects contained therein"; [4] to make over to one a house with the whole furniture therein "during all the days of her natural life"; [5] to give one "the liferent use of" a house; [6] to give one "the liferent use and enjoyment" of a house.[7] Where a truster provided that his widow should have the liferent use and enjoyment of his house "free of rent, feu-duty, ground-annual, taxes, and all other deductions," it was held that the trustees were not bound to pay gas and water rates for the widow.[8]

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[1] *Macdougall's Factor* v. *Watson*, 1909 S.C. 215, per Lord Ardwall at p. 217; *Montgomerie Fleming's Trs.* v. *Montgomerie Fleming*, 1901, 3 F. 591; *Ross's Trs.* v. *Nicoll*, 1902, 5 F. 146; *Dunlop's Trs.* v. *Dunlop*, 1903, 6 F. 12.

[2] *Curle's Trs.* v. *Millar*, 1903, 46 S.L.R. 7; *Macdougall's Factor* v. *Watson*, 1909 S.C. 215.

[3] *Fisher's Exrx.* v. *Fisher's Trs.*, 1903, 6 F. 196; see opinion of Lord Trayner at p. 199 *re* duplicands payable at fixed intervals.

[4] *Dickson* v. *Dickson*, 1823, 2 S. 152 (N.E. 138); *Wallace* v. *Deas*, 1831, 10 S. 164; Ersk. ii. 9, 42; Bankt. ii. 6; Bell's Prin., ss. 1040, 1048; Rankine on Land-Ownership, 4th ed., p. 726 *et seq.*

[5] Ersk. ii. 9, 57; Bell's Prin., s. 1057; *Fraser* v. *Middleton*, 1794, Mor. 8256.

[6] *Fraser* v. *Croft*, 1898, 25 R. 496.

[7] *Redfearn* v. *Maxwell*, 7th March 1816, F.C.

[8] *Pottie*, 1902, 4 F. 876.

[9] Ersk. ii. 9, 61.

SUBSECTION (2).—*For Debts.*

522. The liferenter is not liable for the debts of the disponer, these being properly a burden on the fee, where the fee is sufficient to discharge them.[9] He is liable for the interest on heritable debts due from the lands during the term of his liferent.[10] But if the liferenter is expressly burdened with debts, he will be liable to the extent that he is *lucratus* under the deed.[11] In a case where a testator gave his wife a liferent of his lands and the fee of the residue of his moveable estate, and conferred upon her full power to "raise such sums as may be required to pay all debts and succession duties which may fall upon her after my decease, as well as all my debts and funeral expenses," it was held that this power did not authorise her to charge the heritage with the debts and funeral expenses or with the whole estate duty, but only to charge it with the rateable part of estate duty effeiring to the heritage itself.[12]

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[1] *Lady Samford* v. *The Tenants*, 1686, Mor. 13070; *Lady Elsh-sheels* v. *Laird of Elsh-sheels*, 1688, Mor. 13070; *Lumisden* v. *Robertson*, 1704, Mor. 13072.

[2] *Lady Elsh-sheels* v. *Laird of Elsh-sheels, supra.*

[3] *Minister of Morham* v. *Laird and Lady Binston*, 1679, Mor. 8499; *Lady Anstruther* v. *Anstruther's Tutors*, 1823, 2 S. 306 (N.E. 269).

[4] *Clark and Ors.*, 1871, 9 M. 435.

[5] *Bayne's Trs.* v. *Bayne*, 1894, 22 R. 26.

[6] *Cathcart's Trs.* v. *Allardice*, 1899, 2 F. 326.

[7] *Smart's Tr.* v. *Smart's Trs.*, 1912 S.C. 87; but cf. *Johnstone* v. *Mackenzie's Trs.*, 1912 S.C. (H.L.) 106; *Montgomerie Fleming's Trs.* v. *Carre*, 1913 S.C. 1018; *Miller* v. *Inland Revenue*, 1928 S.C. 819.

[8] *Rodger's Trs.* v. *Rodger*, 1875, 2 R. 294; cf. *Milne's Tr.* v. *Milne*, 1920 S.C. 456.

[9] *Stewart* v. *Stewart*, 1792, Bell's Oct. Cas. 220, per Lord Braxfield.

[10] *Lady Forbes* v. *Lord Forbes*, 1765, 2 Pat. 84.

[11] *Waddell* v. *Waddell*, 1818, 6 Dow 279; 6 Pat. 374.

[12] *Fraser* v. *Croft*, 1898, 25 R. 496.

523. Expenses incurred in realising an estate or changing the securities thereof must be deducted from the gross capital, but the ordinary annual expense of managing the trust estate, including the ordinary management of the heritable property, is to be deducted from the gross annual rents or profits thereof. All extraordinary expenses, however, brought upon the trust estate in the course of management, such as the expense of processes for the division of a commonty or for the augmentation of minister's stipend, are to be deducted from the capital stock of the estate.[1] Where a liferentrix paid off a debt heritably secured over the subject of the liferent and took no assignation to the bond, which was discharged, it was held that the fiars were not liable to repay the amount so paid by her.[2] Even had the debt remained upon the property, the creditor could have only gone against the property for it; the fiars would not have been liable to pay the debt.[3]

SUBSECTION (3).—*For Upkeep, etc.*

524. The liferenter is bound to keep the subjects in proper repair,[4] and for this purpose he is entitled to use minerals, *e.g.* lime, etc., or timber on the estate, but he is not bound to erect embankments upon a river running through the estate,[5] nor to defray the expense of erecting new march fences.[6] A person whose right is merely one of occupancy is liable for tenant's repairs,[7] but not for repairs of pavement and roof.[8] Without deciding whether the right of beneficiaries in certain lands was a right of fee or of liferent and fiduciary fee, the Court granted them power to charge the lands with the cost of extraordinary repairs which had become necessary.[9] The liferenter will only be answerable for deterioration arising from his own neglect. In proving neglect by the liferenter the condition of the subjects at the beginning of the liferent must be ascertained, not that during the prescriptive period.[10] Should the subjects be destroyed in whole or in part by *vis major*, such as fire or flood, neither liferenter nor fiar is bound to replace or repair them: but probably either is entitled to do so, with a claim of relief against the other according to their respective interests. If the liferenter rebuild or repair, he will be entitled to compensation from the fiar taking the benefit to the extent that the latter is *lucratus*, or the fee may be burdened with the principal sum, but not with the interest, during the liferent.[11] Should the fiar rebuild or repair, he has the right to charge the interest on the cost against the liferenter who takes the benefit.[1] Expenditure on new work, such as additions to fabric, forms a burden on the fiar.[2] So does undeveloped land duty, the liferenter suffering the loss of income on the capital applied in payment of the duty. Where lands are held by trustees for a liferenter and a fiar, a taxed composition, exigible, *e.g.*, every fifteen years, is payable out of capital.[3]

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[1] *Pearson* v. *Casamajor*, 1840, 2 D. 1020.

[2] *Wallace* v. *Braid*, 1900, 2 F. 754.

[3] Per the Lord Justice-Clerk at p. 759; see Bell's Prin., ss. 1060, 1061.

[4] *Cuningham* v. *Cuningham*, 1733, Mor. 8275; *Lady Borthwick, Supplicant*, 1696, Mor. 8245.

[5] *Dickson* v. *Dickson*, 1823, 2 S. 152 (N.E. 138).

[6] *Mackenzie* (*Greig's Judicial Factor*), 1896, 4 S.L.T. 24.

[7] *Kinloch's Trs.* v. *Kinloch*, 1880, 7 R. 596; *Bayne's Trs.* v. *Bayne*, 1894, 22 R. 26.

[8] *Clark*, 1871, 9 M. 435.

[9] *Pottie*, 1902, 4 F. 876.

[10] *Cuningham* v. *Cuningham*, 1733, Mor. 8275.

[11] *Haliday* v. *Gardine*, 1706, Mor. 13419; *Scot* v. *Forbes*, 1755, Mor. 8278; *Nelson* v. *Gordon*, 1874, 1 R. 1093, per Lord Pres. Inglis at p. 1099.

525. A liferenter's improvements are presumed to be made for his own benefit:[4] but this presumption may be rebutted by circumstances, as where a liferenter has expended money in improving the subject of his liferent in the erroneous belief that he was fiar.[5]

526. The remedy available to the fiar for enforcing the observance of these rules by the liferenter is a demand for caution (*cautio usufructuaria*). Provisions for enforcing such caution were inserted in early Acts,[6] but by modern decisions caution will not be required unless on reasonable cause shewn that there is danger of the liferenter wasting or neglecting the subjects.[7] Should the subjects liferented suffer damage, the fiar for the time is not entitled to recompense, as such damage is due to the holder of the fee at the termination of the liferent.[8] For the form of conclusions of summons in an action of declarator and damages by a fiar against a liferenter in possession for the protection from injury by game and rabbits of young trees planted by him on the estate during the liferenter's possession, and averments which were in support thereof admitted to proof before answer, see the case cited.[9]

527. The Act of 1491, c. 25, while it contained a provision requiring caution of conjunct fiars and liferenters, dealt in the main with ward-holding, and it was in that connection that it provided that an heir with no other means of sustenance must be allowed aliment out of the estate. This was extended by a series of decisions to the case of fiar and liferenter.[10] But the doctrine has been discredited by Sir Geo. Mackenzie,[11] and by the opinions of the House of Lords,[12] and is probably no longer sound law.[13]

SECTION 6.—LIFERENT IN MOVEABLES.

528. A liferent in moveable estate may be constituted or reserved only in favour of one in life at the date of the deed constituting or reserving such liferent.[14] Where a testator directed his trustees to set apart certain shares of his estate for behoof of his children, and provided that these shares should not vest in his children or grandchildren, but that they should be paid the interest of their shares, and that on the death of the grandchildren the fee should be paid over to his great-grandchildren on their attaining majority, certain grandchildren of full age and born after the date of the testator's death claimed immediate payment of the fee of their shares in virtue of s. 17 of the Entail Amendment (Scotland) Act, 1868;[1] the Court held that they were entitled to immediate payment of the fee.[2] The proper moveable subjects for a liferent are sums of money, where the fruits enjoyed by the liferenter are the interests on capital sums. The liferenter has, further, a certain power of dealing with the capital itself, to uplift and reinvest, on due security being given to the fiar.[3]

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[1] Bell's Prin., ss. 1062, 1063; Rankine on Land-Ownership, 4th ed., pp. 743, 744.

[2] *Shaw's Trs.* v. *Bruce*, 1917 S.C. 169.

[3] *Edgar's Trs.* v. *Edgeware*, 1915 S.C. 175.

[4] *Wallace* v. *Braid*, 1900, 2 F. 754.

[5] *Morrisons* v. *Allan*, 1886, 13 R. 1156.

[6] Act 1491, c. 25 (record ed. p. 9); Act 1535, c. 15 (record ed. p. 13); Act 1594, c. 226 (record ed. p. 89).

[7] *Ralston* v. *Leitch*, 18th November 1803, Hume 293.

[8] Ersk. ii. 9, 59.

[9] *Ewing* v. *Ewing*, 1881, 19 S.L.R. 20.

[10] Mor. *sub voce* "Aliment," pp. 381–409; *Macfarlane* v. *Finlay*, 1825, 4 S. 158 (N.E. 159).

[11] "Observations," p. 101.

[12] *Maule* v. *Maule*, 1825, 1 W. & S. 266.

[13] *Macfarlane* v. *Finlay*, *supra*; see Ersk. ii. 9, 62; Bell's Prin., s. 1065; Rankine on Land-Ownership, 4th ed., p. 746.

[14] 31 & 32 Vict. c. 84, s. 17.

529. Questions sometimes arise in determining in a question between liferenter and fiar what is income and what is capital. Where a truster directed that his widow should enjoy the "free liferent use and enjoyment of the residue" of his estate, it was held that a share of the profits of his business, which it was stipulated in his contract of copartnery that his trustees should be entitled to receive from his surviving partner for several years, did not belong to the widow as income, but fell as capital into residue.[4] It has been held that royalties and profits derived from the sale of books published prior to the death of a testator fall to the liferenter as income, and all proceeds from the sale of books published after his death are to be treated as capital.[5] The earnings of ship shares have been held to be income and so payable to a liferenter.[6] Where a truster authorised his trustees to retain his interest in a colliery, and, for the purpose of ascertaining the amount of residue falling to be divided, directed that his interest in the colliery should be valued by his trustees, questions having arisen between liferenters and fiars as to the profits from the colliery, it was held that the liferenters were entitled to £4 per cent. per annum on the sum at which the interest in the colliery had been valued.[7] It has been held that the price of shares burdened with a liferent, sold in the interval between two dividends, fell to be divided between capital and income, on the basis of the dividend admitted by the parties to have been expected at the date of sale and not of the dividend ultimately paid.[8]

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[1] 31 & 32 Vict. c. 84, s. 17.

[2] *Baxter* v. *Baxter*, 1909 S.C. 1027; see, however, *Shiell's Trs.* v. *Shiell's Trs.*, 1906, 8 F. 848; *Macculloch* v. *Macculloch's Trs.*, 1903, 6 F. (H.L.) 3.

[3] *Kinross* v. *Laird of Hunthill*, 1661, Mor. 8262; *Salton* v. *Crawfurd*, 1697, 4 Bro. Supp. 377; *Fleming* v. *Flemings*, 1661, Mor. 8256; *Jordan* v. *Homes*, 1680, Mor. 8264; *Malcolm* v. *Neilson*, 1731, Mor. 8266.

[4] *Freer's Trs.* v. *Freer*, 1897, 24 R. 437; *Dykes's Trs.* v. *Dykes*, 1903, 6 F. 133.

[5] *Davidson's Trs.* v. *Ogilvie*, 1910 S.C. 294.

[6] *Hay's Trs.* v. *Hay*, 1903, 11 S.L.T. 306; see also *Brown* v. *Gellatly*, 1867, L.R. 2 Ch. 751.

[7] *Bain's Trs.* v. *Bain*, 1902 (H.L.), 40 S.L.R. 66; see also *Dempster's Trs.* v. *Dempster*, 1898, 35 S.L.R. 657.

[8] *Cameron's Factor* v. *Cameron*, 1873, 1 R. 21; *Donaldson* v. *Donaldson's Trs.*, 1851, 14 D. 165.

530. Part of a price may represent undistributed profits and apportionment may be required.[1] With regard to extraordinary payments, such as a bonus, a limited fiar has been held entitled to receive such a payment, a liferenter only entitled to the interest upon the sum during life.[2] The respective interests of liferenter and fiar in a bonus declared on shares in a company will be determined by the mode in which the company deals with it. Where a company has power either of distributing its profits as dividends or of converting the profits into capital, and the company validly exercises that power, such exercise will be binding on all persons interested, so that what is paid by the company as dividends goes to liferenters, and what is paid by the company as capital or appropriated as an increase of the capital stock enures to the benefit of those interested in the capital.[3]

531. Questions also arise in determining what burdens and losses are to be borne by capital and what by income. Trustees carrying on a testator's business are not entitled to set off against a liferenter, as charges against income, any sums by way of depreciation on buildings or plant other than sums actually expended by the trustees in the reasonable maintenance, repair, and renewal of buildings and plant forming part of the residue.[4] Where trustees failed to dispose of the lease of a music hall or to sublet the premises, it was held that the loss thereby occasioned fell to be charged against the fee of the residue of the estate in a question between a liferentrix and fiars.[5] Expenses connected with the examination of investments from time to time and changes in them fall to be paid out of capital and not out of income.[6] Where a testator directed his trustees to pay to themselves annually a certain sum, it was held that on the arrival of the period for the division of the residue the trustees were not entitled to retain part thereof to provide for the annual payment to themselves, but must charge the same against the income of an alimentary fund.[7] A liferenter whose name appeared on the register of a joint-stock company along with that of the fiar has been held to be a member of the company, and as such liable *in solidum* for calls.[8]

532. In a liferent of furniture the liferenter is not responsible for deterioration by ordinary tear and wear, and will not have to replace articles which are worn out.[9] In the case of the implements and stocking of a farm given in liferent, the liferentrix was held bound to leave at the end of her occupation implements, etc., of substantially the same description, value, and extent as at its commencement.[1]

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[1] *M'Leod's Trs.* v. *M'Leod*, 1916 S.C. 604.

[2] *Rollo* v. *Irving*, 1st December 1801, F.C.; Mor. "Liferenter," App. No. 1; revd. 1803, *Irving* v. *Houston*, 4 Pat. 521; *Cumming* v. *Cumming's Trs.*, 1824, 2 S. 743 (N.E. 620).

[3] *Gunnis's Trs.* v. *Gunnis*, 1903, 6 F. 104; *Cunliff's Trs.* v. *Cunliff*, 1900, 3 F. 202; *Blyth's Trs.* v. *Milne*, 1905, 7 F. 799; *Howard's Trs.* v. *Howard*, 1907 S.C. 1274.

[4] *Ellis* v. *Ellis's Trs.*, 1895, 22 R. 764.

[5] *Rossborough's Trs.* v. *Rossborough*, 1888, 16 R. 157.

[6] *Smith* v. *Bennie*, 1890, 18 R. 44; *Wears* v. *Roger's Tr.*, 1906, 13 S.L.T. 980.

[7] *Kirkwood* v. *Kirkwood's Trs.*, 1912 S.C. 613.

[8] *Wishart and Dalziel* v. *City of Glasgow Bank*, 1879, 6 R. 823.

[9] *Cochran's Trs.* v. *Cochran*, 1755, Mor. 8280; Bell, Ill. II, 141.

533. A general clause in a marriage settlement conveying *acquirenda* to trustees will not include a liferent interest in moveables.[2]

SECTION 7.—TERMINATION OF LIFERENT, AND QUESTIONS ARISING AT TERMINATION.

534. As a liferent is entirely personal to the liferenter, it follows that the right itself cannot be transferred to another. That is to say, that though the liferent may be assigned, this is in fact only an assignation to the rents of the subjects liferented during the life of the liferenter. A liferent can only end (1) by the death of the liferenter, (2) by consolidation of the estates of liferent and fee, or (3) by renunciation by the liferenter.[3] Questions have arisen as to the relative rights of the liferenter's executors and of the fiar to the fruits of the subjects at the termination of the liferent. The main rule of decision has been stated thus: that that part of the rents, to which the liferenter had a proper right before his death, falls to his executors; the residue, as never having been *in bonis* of the deceased, must be still accounted part of the lands, and so devolves on the fiar.[4] Thus the natural spontaneous fruits of the soil, such as natural grass or woods, where the latter are under the liferenter's control, go to the liferenter as far as they have been separated from the soil and passed *in bonis* to him at the date of his death. Should his representatives continue to acquire such fruits, they will be liable to a claim from the fiar. Industrial fruits of the soil, such as grain crops, etc., follow the rule *messis sementem sequitur*, and such fruits, even though not separated, will remain the property of the liferenter, his representatives being allowed to win them without liability to the fiar for rent.[5]

535. The right to all other civil and industrial fruits may now be said to vest *de die in diem*. At common law a difference exists between the fruits of mines, fishings, saltworks, and the like, whose profits are the result of daily labour, and the rents derived from lands, mills, and houses. The former, with the rents of premises let for industrial enterprise, have always been held to vest *de die in diem*. As to the latter, by the common law the liferenter is only entitled to the rents legally due at the terms which he has survived. Thus if he survive the term of Whitsunday, his executors are entitled to the rents for the first half-year from Martinmas to Whitsunday legally due at that term, but he acquires no right to the rents for the second half-year unless he survives the term of Martinmas, when they fall due. No exception is made to this rule where the rents are conventionally postponed, the right to these vesting at the legal terms, but "forehand" rents are held to vest at the conventional terms.[1] This rule of the common law has been substantially altered by the provisions of the Apportionment Acts. The first Act,[2] passed in the year 1834, was an English Act and its phraseology entirely English; but its provisions were held applicable to Scotland. It gave to the executors of persons having a limited interest in reserved rents or rent-charges the right to such rents up to the date of the predecessor's death. This provision only extended to rents payable "under any instrument in writing that shall be executed" after its date (s. 2).[3]

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[1] *Rogers* v. *Scott*, 1867, 5 M. 1078.

[2] *Boyd's Trs.* v. *Boyd*, 1877, 4 R. 1082; *Young's Trs.*, 1885, 12 R. 968.

[3] See Bell's Prin., s. 1066, and cases there cited; see also *Annandale* v. *Macniven*, 1847, 9 D. 1201; *Smith and Campbell*, 1873, 11 M. 639; *Martin* v. *Bannatyne*, 1861, 23 D. 705.

[4] Ersk. ii. 9, 64.

[5] Ersk. ii. 9, 64, 65; *Guthrie* v. *Laird of Mackerston*, 1671, Mor. 15891; *Cockburn* v. *Brown's Exrs.*, 1748, Mor. 15911; Elch. "Liferenter," No. 5; *Keith* v. *Logie's Heirs and Dr. Young*, 1825, 4 S. 267 (N.E. 272).

536. The wider Act of 1870 [4] has practically superseded the common-law rule and the above-mentioned statute. Its main provisions, as far as touching the subject in hand, are as follows: It provides that after the passing of the Act, all rents (including all periodical payments or renderings in lieu of or in the nature of rent), annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall, like interest on money lent, be considered as accruing from day to day, and be apportionable in respect of time accordingly (s. 2). Such apportioned part is payable or recoverable at the date when the entire payment of which it is a portion becomes due or payable, or would have become so but for the determination of the interest (s. 3). And the person entitled to the apportioned part under this section is to have the same rights and remedies for its recovery as he would have had for the recovery of the whole when payable, if entitled thereto (*ibid.*). In the case of rents reserved out of or charged on lands or hereditaments of any tenure, these remedies are available not against those primarily liable to pay such rents, but against the heir or other person who, but for the apportionment, would have been entitled to draw the "entire continuing rent," such heir or other person being entitled to draw the rents in the first instance. Annual sums made payable in policies of assurance of any description are not rendered apportionable (s. 6). Sec. 7 excludes cases where it is expressly stipulated that no apportionment shall take place.[5] In effect this statute alters the law entirely as regards the "broken term." It gives the liferenter right to a proportion of the rents of that term corresponding to the part of it which he has survived. The common law remains unchanged as regards the rents due at the full terms survived.[6]

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[1] Ersk. ii. 9, 64, 66; Bell's Prin., s. 1047; Rankine on Land-Ownership, 4th ed., pp. 737 *et seq.*, and cases there cited.

[2] 4 & 5 Will. IV. c. 22.

[3] See Ersk. ii. 9, 66 n. (*a*), and cases there cited.

[4] 33 & 34 Vict. c. 35.

[5] *Macpherson's Trs.* v. *Macpherson*, 1907 S.C. 1067.

[6] Ersk. ii. 9, 66 n. (*a*); Bell's Prin., s. 1047, and cases there cited; *Campbell* v. *Campbell*, 1849, 11 D. 1426; *Tennent's Exr.* v. *Lawson*, 1897, 35 S.L.R. 72; *Balfour's Exrs.* v. *Inland Revenue*, 1909 S.C. 619.

SECTION 8.—LIFERENT OR FEE.

537. Difficulty sometimes arises in determining whether a bequest is one of liferent or fee. Where a testator gave directions to trustees "to hold the residue of my estate and distribute it annually between the following gentlemen," it was held that this was a bequest of the fee to the persons named.[1] It was also held to be a gift of fee where the directions to the trustees were to "hold in behoof of" certain persons and pay them the income.[2] Where a truster directed his trustees "to lay out and invest" a sum of money and "pay the proceeds" to two sisters, and also authorised them, if they should think it more advisable, to purchase with the money an annuity payable to the two sisters, and there was no further disposal of the fee of the sum, it was held that the fee of the bequest had vested in the sisters.[3] A bequest of interest was held not to carry capital; [4] and where a testator directed his trustees to pay in all time coming the income of funds to certain charitable institutions, it was held that these institutions had no right to call on the trustees to denude in their favour.[5] It was held, on a construction of the deeds in the cases undernoted,[6] that a bequest of rents did not import a bequest of the fee. In another case,[7] however, it was held that there was an implied direction to convey the fee. A testator appointed an executor but left the residue of his estate to two persons "for behoof of" two ladies. These latter were held to be fiars, the decision turning mainly on the testator's injunction to the nominal legatees "not to put a shilling at risk during the life of the two ladies." [8] Where a testatrix in her will provided, after certain legacies, for "the residue to go to my two sisters," and thereafter, after certain further legacies, provided for "the residue to go to" certain schemes of the Church of Scotland, "that is after my sisters' deaths," it was held that the sisters were entitled to the residue of the estate as their own absolute property in fee but that there was a valid substitution in favour of the Church of Scotland defeasible at the will of the sisters.[9] Where, however, a testator directed his trustees to convey a house to his brother A. and by codicil provided "the house . . . left to my brother A. . . . I wish to be given to his daughter after the death of her father," it was held that the codicil restricted A.'s right to one of liferent and gave the fee to his daughter.[10]

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[1] *Anderson* v. *Thomson*, 1877, 4 R. 1101.

[2] *Forrest's Trs.* v. *Forrest*, 1902, 9 S.L.T. 486; *Smith's Trs.* v. *Smith*, 1883, 10 R. 1144; *Whitehead's Trs.* v. *Whitehead*, 1897, 24 R. 1032.

[3] *Lawson's Trs.* v. *Lawson*, 1890, 17 R. 1167.

[4] *Patrick* v. *Fowler*, 1900, 2 F. 690.

[5] *Crawford's Trs.* v. *The Working Boys' Home*, 1901, 8 S.L.T. 371.

[6] *Mackenzie's Tr.* v. *Mackenzie*, 1899, 2 F. 330; *Sim* v. *Duncan*, 1900, 2 F. 434.

[7] *Henderson's Trs.* v. *Henderson*, 1876, 3 R. 320.

[8] *Veitch's Trs.* v. *Rutherford*, 1914 S.C. 182.

[9] *Mitchell, etc.* v. *General Assembly of the Church of Scotland*, 1895, 2 S.L.T. No. 594, p. 629; see also *Rae's Trs.* v. *Rae*, 1893, 20 R. 826.

[10] *Jamieson's Trs.* v. *Jamieson*, 1899, 2 F. 258; see also *Gibson's Trs.* v. *Ross*, 1877, 4 R. 1038; *Houston or Mitchell* v. *Mitchell*, 1877, 5 R. 154; *Newall's Tr.* v. *Inglis's Trs.*, 1898, 25 R. 1176; cf. *Smart* v. *Smart*, 1926 S.C. 392; *Mearns* v. *Charles* (O.H.), 1926 S.L.T. 118; *Graham* v. *Graham's Trs.* 1927 S.C. 388; *Fogo's Judicial Factor* v. *Fogo's Trs.*, 1929 S.C. 546.

538. A right of liferent and a power of disposal occurring together, if both are given in unqualified terms, are held to amount to a fee.[1] A direction to trustees to pay to the assignees of a liferenter has been held to be equivalent to an unqualified power of disposal given to the liferenter.[2] In a case where a testator had bequeathed a share of residue to his daughter for "her alimentary liferent use only and for her issue, whom failing her own heirs and assignees whomsoever in fee," and the daughter died without issue but leaving a trust disposition and settlement disposing of her whole estate, it was held that she had not taken a vested right to a fee of the share of residue, but that "assignees" was here equivalent to "nominees," and the share which she liferented was carried by her trust disposition and settlement.[3] "Wherever there is a contingent destination to fiars named or designed, that would prevent the power of disposal being added to the liferent so as to create a fee; in any event it would prevent that result being attained so long as the conditional destination should be in force." [4] In the undernoted cases [5] it was held that the beneficiary's right did not amount to one of fee, it being either a bare liferent or a liferent with a testamentary power of disposal.

539. Where a liferenter does not exercise the power conferred upon him, the subject of the liferent, if not otherwise disposed of, will revert to the estate of the granter of the right.[6] The cases undernoted deal with the liability of a liferenter, or the executors of a liferenter, who had a power of encroachment or of disposal, to account for his intromissions with the subjects liferented.[7] Where a liferentrix was given power "by herself alone during her life to sell, burden, or otherwise dispose onerously or gratuitously of the said subjects as she may think proper," it was held that the power did not entitle her to dispose of the subjects by a *mortis causa* deed.[8] Where a person was given power to "devise," it was held that he had power to dispose only by *mortis causa* deed.[9]

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[1] *Rattray's Trs.* v. *Rattray*, 1899, 1 F. 510, and cases referred to by Lord M'Laren in his opinion at p. 512; see also *Mickel's Judicial Factor* v. *Oliphant*, 1892, 20 R. 172; *Young's Trs.* v. *Young* (O.H.), 1899, 7 S.L.T. 266; *Thomson* v. *Blair* (O.H.), 1900, 8 S.L.T. 234.

[2] *Rattray's Trs.* v. *Rattray*, *supra*.

[3] *Barr* v. *Parnie*, 1903, 11 S.L.T. 426.

[4] *Rattray's Trs.* v. *Rattray*, *supra*, per Lord M'Laren at p. 512.

[5] *Alves* v. *Alves*, 1861, 23 D. 712; *M'Kinlay's Trs.*, 1898, 5 S.L.T. 253; *Reid* v. *Reid's Trs.*, 1899, 1 F. 969; *Douglas's Trs.*, 1902, 5 F. 69; *Peden's Tr.* v. *Peden*, 1903, 5 F. 1014; *Tait's Trs.* v. *Neill*, 1903, 6 F. 138; *Forrest's Trs.* v. *Reid*, 1904, 7 F. 142; *Anderson's Trs.* v. *Anderson*, 1904, 7 F. 224; *Mackenzie's Trs.* v. *Kilmarnock's Trs.*, 1909 S.C. 472; see opinion of the Lord President at p. 477; *Ewing's Trs.* v. *Ewing*, 1909 S.C. 409; *Glover's Trs.* v. *Glover*, 1913 S.C. 115; *Bannerman's Trs.* v. *Bannerman*, 1915 S.C. 398; *Milne's Tr.* v. *Milne*, 1920 S.C. 456; cf. *Heavyside* v. *Smith*, 1929 S.C. 68.

[6] *Barr's Trs.* v. *Barr's Trs.*, 1891, 18 R. 541; *M'Kinlay's Trs.*, 1898, 5 S.L.T. 253; *Howe's Trs.* v. *Howe's Judicial Factor*, 1903, 5 F. 1099; *Forsyth* (*Stephen's Exrx.*) v. *Forsyth*, 1905, 12 S.L.T. 778; *Denholm's Trs.* v. *Denholm's Trs.*, 1907 S.C. 61; *Dingwall* v. *Dow*, 1909, 2 S.L.T. 311.

[7] *Denholm's Trs.* v. *Denholm's Trs.*, 1908 S.C. 255; *Dingwall* v. *Dow*, *supra*; *Mickel's Judicial Factor* v. *Oliphant*, 1892, 20 R. 172.

[8] *Miller's Trs.* v. *Findlay*, 1896, 24 R. 114; *Barr's Trs.* v. *Barr's Trs.*, 1891, 18 R. 541; *Davis* v. *Davis*, 1898, 6 S.L.T. 24.

[9] *Tait's Trs.* v. *Neill*, 1903, 6 F. 138.

540. There is a rule of English law that "if a testator destines his estate to his heir-at-law after the death of A., there is an implied gift of a life estate to A., but if the person to whom the estate is destined after the death of A. is not the heir-at-law, the implication does not arise."[1] "The rule is equally applicable to the case of the next-of-kin. That rule has never been actually applied in Scotland, but apparently the question has never arisen, and I am inclined to think that in circumstances appropriate for the application of the rule it would be adopted by this Court."[2] Where, however, there was an express gift of liferent to a husband in the event of there being no issue, it was held that a gift of a liferent to him was not to be implied from the postponement of payment to the children until his decease.[3] If there is no express distinction between fee and liferent, *e.g.* "All I possess I leave to A. and after him to B." the Court may hold A. entitled to the fee.[4]

Section 9.—Destinations.

541. In considering grants of liferent and fee in testamentary deeds, marriage contracts, etc., a long series of decided cases has laid down certain rules of interpretation, according to the relationship of the grantees *inter se* or to the granters of the deeds.

Subsection (1).—*Destinations to Strangers.*

542. The bequest of an estate simply, in the absence of any limiting words, will give a right of fee. Where the conveyance is to two or more, "jointly," or in "conjunct fee," each will have a *pro indiviso* share, the property not suffering division. A destination in conjunct fee and liferent to A. and B., or to A. and B. and their heirs, gives each a *pro indiviso* right to the fee of his share, transmitting such right to his heirs, but the survivor will enjoy the liferent of the predeceaser's share. If the destination is to parties jointly and to the survivor, or to the survivor and his heirs, then the fee of the whole on the death of the one passes to the survivor; the expression "to A. and B. and the survivor and their heirs" has been held to have the same effect, "their heirs" in such a destination being equivalent to "the heirs of the survivor."[5] Where parties are given a joint liferent and the fee destined to one and his heirs, the latter has the fee burdened with the other's *pro indiviso* right to the liferent of one-half. A conditional right to the fee may be given by a destination such as to "A. and B. in conjunct fee and liferent, and to B., should he survive, in fee." Here B., on survival, will become fiar of the whole. Should he not survive, the destination will be treated without regard to the latter clause in the destination, according to the rules above stated.[1]

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[1] *Ralph* v. *Carrick*, 1879, 11 Ch. D. 873.

[2] *Bate's Trs.* v. *Bate*, 1906, 8 F. 861, per Lord Low at p. 865.

[3] *Bate's Trs.* v. *Bate, supra.*

[4] *Reid* v. *Dobie*, 1921 S.C. 662.

[5] *Bisset* v. *Walkers*, 1799, Mor. "Deathbed," App. No. 2.

SUBSECTION (2).—*Destinations to Parent and Child.*

543. For a long period, the leading rule in destinations of this class was that a destination to the parent in liferent and to the children unborn or unnamed in fee gave the fee, and not a mere liferent, to the parent.[2] The origin of this rule probably lay in the aversion of Scots lawyers from allowing the fee of a property to be *in pendente*; [3] but the rule which, in these circumstances, gave the parent a fee even though only a liferent was expressed, was extended to all cases, whether of heritable property or moveables.[4] It applied whether or not all the children were alive when the provision came into operation,[5] and whether the destination were to the whole children or only to one, as the heir of the marriage.[6] Any person accordingly using the expression of bequest to one "in liferent and his children in fee" was held to mean by it not what the words naturally imply, but what the law held to be their meaning.

544. The rule of *Frog's Creditors*, however, "has been recognised to be a purely arbitrary rule, incapable of extension, and not to be followed where the context shews that the word 'liferent' is used in its ordinary signification." [7] This might be shewn by the use of the word "allenarly" or "only" or some equivalent restrictive expression, or it might be qualified or restricted by some other part of the settlement.[8] There was nothing in the rule to prevent a testator, even where he used the expression of a bequest to one "in liferent and his children in fee," confining the parent's right to a bare liferent, provided he made his intention clear by something in the deed other than the technical words of the bequest itself.[9] In such cases the right of each child to the fee was held to vest at birth, the parent being considered the "fiduciary fiar" or trustee for the children to be born.[10] "Under no circumstances can a liferenter be also a fiduciary fiar for grantees other than his own issue,"[1] and it is open to much doubt whether a number of persons can be joint fiduciary fiars for the children of all of them as a class.[2] Other indications of the intention to limit the parent's right in such circumstances to one of bare liferent have been found in an exclusion of the parent's creditors,[3] in a gift of "interest" to the parent and "property" to the children,[4] and in a liferent declared to be "alimentary."[5] But a liferent to the parent "during all the days of his life" was held to have no such restrictive force.[6] The rule applied only in the case of a parent and his own children. Thus the destination to A. in liferent and to the children of B. in fee has been held to carry only a life interest to A.[7]

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[1] Ersk. iii. 8, 35; see CONJUNCT RIGHTS, Vol. IV. p. 398, *ante; Johnston*, 1899, 1 F. 720; *Devlin* v. *Lowrie*, 1922 S.C. 255.

[2] *Frog's Crs.* v. *His Children*, 1735, Mor. 4262; *Lindsay's Children* v. *Dott*, 1807, Mor. "Fiar," App. No. 1; *Williamson* (*Johnston's Assignee*) v. *Cochran*, 1828, 6 S. 1035; *M'Clymont's Exrs.* v. *Osborne*, 1895, 22 R. 411.

[3] *Newlands* v. *Crs. of John Newlands*, 1794, Mor. 4289; *Frog's Crs.* v. *His Children*, *supra*; *Ferguson's Trs.* v. *Hamilton*, 1860, 22 D. 1442, per Lord Wood at p. 1457; Bell's Prin., ss. 1710, 1711.

[4] *Mein* v. *Taylor*, 1827, 5 S. 779 (N.E. 727); affd. 1830, 4 W. & S. 22; M'Laren, Wills, 3rd ed., pp. 609, 610.

[5] *Porterfield* v. *Graham*, 1779, Mor. 4277; *M'Donald* v. *M'Lachlan*, 1831, 9 S. 269; *Ferguson's Trs.* v. *Hamilton*, 1860, 22 D. 1442.

[6] *Dewar* (*Campbell's Trs.*) v. *M'Kinnon*, 1825, 1 W. & S. 161.

[7] *Gifford's Trs.* v. *Gifford*, 1903, 5 F. 723, per Lord M'Laren at p. 730.

[8] *Newlands* v. *Newland's Crs.*, 1794, Mor. 4289 (and cases in Mor.); *Harvey* v. *Donald*, 26th May 1815, F.C.; *Miller* v. *Miller*, 1833, 12 S. 31; *Ferguson* v. *Ferguson*, 1875, 2 R. 627; *Cumstie* v. *Cumstie's Trs.*, 1876, 3 R. 921; *Dawson*, 1877, 4 R. 597; *Gifford's Trs.* v. *Gifford*, 1903, 5 F. 723.

[9] *Studd* v. *Cook*, 1883, 10 R. (H.L.) 53, per Lord Watson at p. 61.

[10] *Dundas* v. *Dundas*, 1823, 2 S. 145 (N.E. 133); *Douglas* v. *Thomson*, 1870, 8 M. 374.

545. By the Trusts (Scotland) Act, 1921, s. 8 (1),[8] difficulty has been removed. That enactment provides that where in any deed property is conveyed to any person in liferent and in fee to persons who when the conveyance comes into operation are unborn or incapable of ascertainment, the person to whom the property is conveyed in liferent shall not be deemed to be beneficially entitled to the property in fee by reason only that the liferent is not expressed in the deed to be a liferent allenarly. For the purposes of the enactment, the conveyance comes into operation at the commencement of the liferent.

546. The application of the rule was also averted by the interposition of a trust, but the mere creation of a trust did not of itself displace the rule. The trust to be effectual for that purpose must be one to "hold," and that not for the testamentary purposes generally but for the purposes of the particular bequest.[9] Where the direction is simply to "pay over" or "convey," or the trustees are appointed merely for the purpose of transferring the property, the rules of direct conveyance to parent and child will be applied, and the grant interpreted accordingly.[10]

547. By the Trusts (Scotland) Act, 1921, s. 8 (2),[11] where property is conveyed to one person in liferent and in fee to persons who when the conveyance comes into operation are unborn or incapable of ascertainment, it shall be competent to the Court (*a*) to authorise the fiduciary fiar to act as a trustee, or (*b*) to appoint a trustee or trustees or a judicial factor to hold the property in place of the liferenter or fiduciary fiar. Where, however, the conveyance is not Scottish although the property is in Scotland, s. 8 (2) (*b*) of the statute last mentioned is inapplicable.[1]

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[1] *Tristram* v. *M'Haffies*, 1894, 22 R. 121, per Lord M'Laren at p. 125; *Colvile's Trs.* v. *Marindin*, 1908 S.C. 911.

[2] *Allen* v. *Flint*, 1886, 13 R. 975, per Lord Pres. Inglis at p. 978; *Tristram* v. *M'Haffies*, *supra*.

[3] *Douglas* v. *Sharpe*, 1811, Hume 173; *Dawson*, 1877, 4 R. 597.

[4] *Scott* v. *Napier*, 1826, 4 S. 454 (N.E. 460); affd. 1827, 2 W. & S. 550.

[5] *Dawson*, 1877, 4 R. 597, per Lord Mure at p. 600; *Rait* v. *Arbuthnott*, 1892, 19 R. 687; *Gerran* v. *Alexander*, 1781, Mor. 4402; *Kennedy* v. *Allan*, 1825, 3 S. 554 (N.E. 382).

[6] *Lindsay's Children* v. *Dott*, 1807, Mor. "Fiar," App. No. 1.

[7] *Ramsay* v. *Beveridge*, 1854, 16 D. 764.

[8] 11 & 12 Geo. V. c. 58.

[9] *Seton* v. *Seton's Crs.*, 1793, Mor. 4219; *Mein* v. *Taylor*, 1827, 5 S. 779 (N.E. 727); affd. 1830, 4 W. & S. 22; *Ewan* v. *Watt*, 1828, 6 S. 1125; *Ross* v. *King*, 1847, 9 D. 1327; *Hutchison* v. *Anderson's Trs.*, 1853, 15 D. 570; *Mackie* v. *Gloag's Trs.*, 1884, 11 R. (H.L.) 10; *Sinclair* v. *Sinclair's Exrs.* (O.H.), 1901, 8 S.L.T. 485; *Fraser or Turner* (O.H.), 1901, 8 S.L.T. 466.

[10] *Robertson* v. *Duke of Athole*, 1806, Mor. "Fiar, Absolute, Limited," App. No. 2; *Hutton's Trs.* v. *Gemmell*, 1847, 9 D. 639; *Ferguson's Trs.* v. *Hamilton*, 1860, 22 D. 1442; affd. 1862, 24 D. (H.L.) 8; *Gibson's Trs.* v. *Ross*, 1877, 4 R. 1038; *Beveridge* v. *Beveridge's Trs.*, 1878, 5 R. 1116; *Gifford's Trs.* v. *Gifford*, 1903, 5 F. 723.

[11] 11 & 12 Geo. V. c. 58.

548. Where the destination is to the parent in liferent and to the child or children *nominatim* in fee, the right of the parent is considered one of liferent only, whether it flow from the parent himself or from a stranger.[2] The rule here stated applies to cases either where the child or children are all called *nominatim*, or where the fee is given to one or more *nominatim*, and others *nascituri*. In the latter case ordinarily the fee vests at once in the child named, with a fiduciary fee in him for those to be born, the latter taking as institutes, not as substitutes.[3] But where the provisions of the deed, by a survivor clause or similar provision, postpone the identification of the fiars, the fiduciary fee will be in the parent, not in the children named.[4]

549. Where a parent has conveyed the fee to a child under reservation of his own liferent, with an absolute power of disposal in the parent, the right of the latter will be held to be one of fee, and that even where the liferent is limited by the word "allenarly."[5] In conveyances by the father to the children, the parent is considered to reserve the liferent to himself, even where this is not definitely stated, unless there is a clear intention to the contrary.[6]

550. "Where there is a direct bequest or a direction to trustees to pay or convey to a daughter in terms which according to the natural meaning of the language used import a gift, that gift will not be recalled by a subsequent direction to the trustees to hold the fund for or settle it upon the daughter in liferent, for her liferent use allenarly and her children in fee, except in so far as may be requisite to give effect to these purposes, and accordingly if there are no children, the fee will vest absolutely in the daughter and be *in bonis* of her at her death."[7] The Court construes the direction to the trustees as being given only for the protection of the immediate beneficiary. "Such a construction is especially appropriate in the case of a daughter whose share is made subject to a trust for herself in liferent and her children in fee, but I do not say that it is confined to the case of shares of succession limited to daughters. It is, however, essential to the proper application of this principle of construction that there should be an independent, unqualified gift to the immediate beneficiary."[1] "Of course there may be cases where the primary gift is so qualified in expression as to shew that no higher right is meant to be given than is more fully explained in the sequel, and no rule can be laid down which will dispense with the necessity of carefully considering the effect of all the clauses and provisions bearing on the right conferred."[2] Where there is no original direct provision of a gift or interest, but a direction to trustees to hold, no right of fee will be conferred.[3] A direction to "hold for behoof of" may import a gift of fee, but it depends on the context.[4] [See VESTING, *sub voce* subject to defeasance.]

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[1] *Cripps's Trs.* v. *Cripps*, 1926 S.C. 188.

[2] *M'Intosh* v. *M'Intosh*, 28th January 1812, F.C.

[3] *Dykes* v. *Boyd*, 3rd June 1813, F.C.

[4] *M'Gowan* v. *Robb*, 1862, 1 M. 141; *Macgowan* v. *Robb*, 1864, 2 M. 943; *Snell* v. *White and Ors.*, 1872, 10 M. 745.

[5] *Cumming* v. *H.M. Advocate*, 1756, Mor. 4268; *Baillie* v. *Clark*, 23rd February 1809, F.C.; *Dickson* v. *Dickson*, 1780, Mor. 4269.

[6] *Wilson* v. *Niblie*, 1825, 3 S. 430 (N.E. 301).

[7] Per Lord Low in *Tweeddale's Trs.* v. *Tweeddale*, 1905, 8 F. 264, at p. 272; cf. *Crumpton's Judicial Factor* v. *Barnardo's Homes*, 1917 S.C. 713; *Smith's Trs.* v. *Clark*, 1920 S.C. 161, and cases *ibi cit.*; *Aitken's Trs.* v. *Aitken*, 1921 S.C. 807.

551. Where only the liferent of a subject had been disposed of in a conveyance by a father to his daughters *nominatim*, and trustees were appointed to see the provisions of the settlement carried into effect, no mention being made of the fee *per expressum*, the daughters were held liferenters only, each of a half of the estate, the fee of each half falling on the liferenter's death into the testator's intestate succession.[5]

552. In a recent case, where a father directed his testamentary trustees to divide or in their absolute discretion to retain the proceeds of his estate (the children being the beneficiaries), the trustees saw no occasion to exercise their discretionary power, and the Court decided that the children were fiars notwithstanding a declaration that the bequests should be alimentary. The decision was based on the doctrine of repugnancy.[6]

SUBSECTION (3).—*Destinations to Husband and Wife.*

553. In a conjunct destination to husband and wife the most general rule gives the fee, in absence of any other indication, to the husband,

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[1] Lord M'Laren in *Muir's Trs.* v. *Muir's Trs.*, 1895, 22 R. 553, at p. 557; *Lindsay's Trs.* v. *Lindsay*, 1880, 8 R. 281; *Downie's Trs.* v. *Cullen*, 1882, 9 R. 749; *Bradford* v. *Young*, 1884, 11 R. 1135; *Dalglish's Trs.* v. *Bannerman's Exrs.*, 1889, 16 R. 559; *Cheyne & Stuart* v. *Irving Smith*, 1889, 26 S.L.R. 391; *Logan's Trs.* v. *Ellis*, 1890, 17 R. 425; *Gilbertson's Trs.*, 1893, 1 S.L.T. 354; *Greenlees's Trs.* v. *Greenlees*, 1894, 22 R. 136; *Collie* (*Walker's Exr.*) v. *Donald, etc.*, 1895, 3 S.L.T. 95; *Stewart's Trs.* v. *Stewart*, 1896, 23 R. 416; *Mackay's Trs.* v. *Mackay's Trs.*, 1897, 24 R. 904; *Dunlop's Trs.* v. *Sprot's Exr.*, 1899, 1 F. 722; *Laing's Trs.* v. *Hamilton*, 1899, 36 S.L.R. 701; *Tweeddale's Trs.* v. *Tweeddale*, 1905, 8 F. 264; *Moore* (*Bunten's Factor*) v. *Bunten*, 1909, 2 S.L.T. 451.

[2] Lord M'Laren in *Mackay's Trs.* v. *Mackay's Trs.*, *supra*, at p. 907; *Duthie's Trs.* v. *Kinloch*, 1878, 5 R. 858; *Fulton's Trs.* v. *Fulton*, 1880, 7 R. 566; *Muir's Trs.* v. *Muir's Trs.*, *supra*; *Baird's Trs.* v. *Jackson*, 1903, 5 F. 472; *Matthew's Trs.* v. *Matthew*, 1905, 13 S.L.T. 470; *Steele* (*Andrew Ramsay's Judicial Factor*) v. *Kerr and Ors.* (*Smith's Trs.*), 1910, 1 S.L.T. 87; see also *Miller Richard's Trs.* v. *Miller Richard*, 1903, 5 F. 909; *Brash's Trs.* v. *Phillipson*, 1916 S.C. 271; *Donaldson's Trs.* v. *Donaldson*, 1916 S.C. (H.L.) 55; *Nicol's Trs.* v. *Farquhar*, 1918 S.C. 358.

[3] *Young's Trs.* v. *Young*, 1901, 3 F. 616; *MacGregor's Trs.* v. *MacGregor*, 1909 S.C. 362; *Neilson and Ors.* (*Wm. Neilson's Trs.*) v. *Neilson and Ors.* (*Thomas Neilson's Trs. and Ors.*), 1909, 2 S.L.T. 282.

[4] *Greenlees's Trs.* v. *Greenlees*, 1894, 22 R. 136; *Gillies's Trs.* v. *Hodge*, 1900, 3 F. 238.

[5] *Spinks's Exrs.* v. *Simpson*, 1894, 21 R. 551.

[6] *Watson's Trs.* v. *Watson*, 1913 S.C. 1133; cf. *Cowan's Tr.* v. *Jardine*, 1913 S.C. 927.

propter eminentiam masculini sexus. So in a destination merely to "husband and wife" or to them in conjunct fee, or conjunct fee and liferent, the husband will be held fiar; the wife will have a right to the liferent should she survive.[1] This rule, however, may be overridden by other considerations. Such considerations are—

1. *The Spouse from whom or from whose Friends the Property came.*—The fee of the property will be considered to remain with the spouse from whom the subjects originally came. Thus if the property came from the wife or from her side of the house, and is destined to her and her husband in a conjunct destination, the wife will be held to be fiar, the husband's right being limited to one of liferent.[2] But this consideration will not have effect where the other spouse has obtained conveyance of the property for some onerous consideration, or where it is apparent that the fee was intended to be given to the other. Thus if the husband has bought the property, he will be fiar.[3] Again, if the property forms part of the wife's tocher, the fee will be in the husband,[4] unless the contrary intention is clearly expressed.[5]

2. *The Spouse whose Heirs are Favoured.*—Where the property has come from one other than the spouses, the fact that the heirs of one or other are more favoured in the destination is a circumstance that has weight in considering where the fee falls; and for this purpose, where there are intermediate substitutions, the heirs called directly after the heirs of the marriage are taken, not, as formerly, those last in the destination.[6]

3. *Power of Disposal.*—Where either spouse has an absolute power of disposal, his or her right will be one of fee, and a conjunct liferent coupled with such a power is treated as a right of fee.[7] Where there was a substitution in favour of a wife's assignees she was found to be fiar.[8] In considering this rule it is important to distinguish between an absolute power of disposal and a mere faculty. The power must be absolute, and the party to whom it is granted *sui juris.*[9]

554. Where a conveyance has been made to spouses in conjunct fee and liferent, it will depend on the circumstances of each case whether the right in the spouses is one of fee or of liferent. Where it is the intention that only a liferent shall pass, as where the right is declared to be for liferent use "only," or "allenarly," this intention will be given effect to.[1] As a rule, where the property is given in a conjunct destination for the liferent allenarly of one parent, the other will be presumed to be fiar.[2] But a destination by a wife of her property to the spouses in liferent only and to their children in fee, whom failing one-half to the heirs whatsoever of either spouse, will not divest the wife of the fee where there are no children of the marriage.[3] A conveyance by one spouse to the other in liferent and to the children in fee leaves the granter undivested.[4]

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[1] Stair, ii. 6, 10; Ersk. iii. 8, 36; Bankt. ii. 3. 9; Bell, Com. ii. 1, 5.

[2] *Blair* v. *Henderson*, 1757, 5 Bro. Supp. 335; *Myles* v. *Calman*, 1857, 19 D. 408; *Smith Cunninghame* v. *Anstruther's Trs.*, 1869, 7 M. 689; *Brough* v. *Adamson*, 1887, 14 R. 858.

[3] *Fisher's Trs.* v. *Fisher*, 1844, 7 D. 129.

[4] *Bruce-Henderson* v. *Henderson*, 1790, Mor. 4215; *Graham* v. *Park*, 1639, Mor. 4226; *Gairns* v. *Sandilands*, 1671, Mor. 4230.

[5] *Cameron* v. *Young*, 1837, 15 S. 1205.

[6] *Ramsay* v. *Maxwell*, 1612, Mor. 4226; *Earneslaw's Crs.* v. *Douglases*, 1705, Mor. 4223; affd. *Douglases* v. *Crs. of Douglas*, 1714, Rob. App. 99; *Edgar* v. *Edgar*, 1727, Mor. 4202; *Murray* v. *Blair*, 1739, 1 Pat. 251; *Myles* v. *Calman*, *supra*; *Cameron* v. *Young*, 1837, 15 S. 1205; *Smith Cunninghame* v. *Anstruther's Trs.*, *supra*.

[7] *Earl of Dunfermline* v. *Earl of Callendar*, 1676, Mor. 4244; 3 Bro. Supp. 468; *Ferguson's Tr.* v. *Ferguson*, 1871, 10 M. 54.

[8] *Drover* v. *Maxwell*, 1709, Mor. 4240.

[9] *Boustead* v. *Gardner*, 1879, 7 R. 139; *Pursell* v. *Elder*, 1865, 3 M. (H.L.) 59, and cases cited in Bell's Prin., s. 1714.

555. A destination in "conjunct liferent" is interpreted to give a right of fee where otherwise the fee would be *in pendente*, as where it is destined to children *nascituri*, or to the survivor and their heirs.[5] A destination in conjunct fee and liferent will carry the fee to the husband even where the further destination is to a son *nominatim* in fee.[6] In conjunct destinations to spouses the husband will be held the liferenter, even where the fee is in the wife.[7]

SUBSECTION (4).—*Destinations to Spouses and their Heirs.*

556. Where a destination is to spouses in conjunct fee, or in conjunct fee and liferent, and to the survivor and the heirs of the survivor, the fee will be in the survivor, his heirs having merely a *spes successionis*.[8] A conjunct destination to spouses "and to the survivor and their heirs" is held to have the same effect, the expression "their heirs" being held equivalent to the "heirs of the survivor."[9] But a destination to spouses "in conjunct fee," or "in conjunct fee and liferent, and the survivor and to the heirs of the marriage in fee," will not give a fee to the survivor where it was not already in that spouse during the marriage.[10]

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[1] *Pringle's Crs.* v. *Erskine*, 1714, Mor. 4261; *Watherstone* v. *Rentons*, 1801, Mor. 4297; *Rollo* v. *Ramsay*, 1832, 11 S. 132; *Macgowan* v. *Robb*, 1864, 2 M. 943; *Bryson* v. *Munro's Trs.*, 1893, 20 R. 986.

[2] *Martin's Trs.* v. *Milliken*, 1864, 3 M. 326.

[3] *Wilson* v. *Reid*, 1827, 6 S. 198; see *Wardlaw's Trs.* v. *Wardlaw*, 1880, 7 R. 1070.

[4] *Findlay* v. *M'Intyre*, 1849, 12 D. 325; see also *Turnbulls* v. *Turnbulls' Trs.*, 1822, 2 S. 1; *Stewart* v. *Rae*, 1883, 10 R. 463; *Spence* v. *Banff Town and County Club*, 1885, 22 S.L.R. 535.

[5] *Thomsons* v. *Lawsons*, 1681, Mor. 4258; *Sivright* v. *Dallas*, 1824, 2 S. 643 (N.E. 543); *M'Gregor* v. *Forrester*, 1831, 9 S. 675; affd. 1838, *sub. nom. Forrester* v. *Forrester's Trs.*, 1835, 1 S. & M'L. 441.

[6] *Fisher's Trs.* v. *Fisher*, 1844, 7 D. 129.

[7] *Thom* v. *Thom*, 1852, 14 D. 861.

[8] *Lord Boyd* v. *King's Advocate*, 1749, Mor. 4205; 5 Bro. Supp. 777.

[9] *Fergusson* v. *M'George*, 1739, Mor. 4202; *Riddels* v. *Scott*, 1747, Mor. 4203; *Lord Boyd* v. *King's Advocate*, *supra*; *Burrowes* v. *M'Farquhar's Trs.*, 1842, 4 D. 1484; see also *Walker* v. *Galbraith*, 1895, 23 R. 347.

[10] *Neilson* v. *Murray*, 1732, 1 Pat. 65; *Mackellar* v. *Marquis*, 1840, 3 D. 172; Ross's L.C. 741; *Madden* v. *Currie's Trs.*, 1842, 4 D. 749.

SECTION 10.—LIFERENT UNDER TRUST.

557. In considering the nature of a liferenter's interest under a trust settlement or marriage contract, some modification must be understood of the rules as to a liferenter's powers, etc., laid down above. Where the directions to the trustees do not amount to a direction to convey the subjects in liferent, the beneficiary's right is rather a "life interest," and he must allow the administration of the subjects to remain with the trustees, he himself being entitled only to receive their annual income.[1] Moreover, the context of a destination may shew that the right conferred is neither wholly one of fee nor merely one of liferent, but, *e.g.*, liferent and fiduciary fee.[2]

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[1] See *Ker's Trs.* v. *Justice*, 1868, 6 M. 627.

[2] *Lockhart's Trs.* v. *Lockhart*, 1921 S.C. 761.

LIFERENT ESCHEAT.

See CASUALTIES OF SUPERIORITY.

LIGHTHOUSES.

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SECTION 1.—INTRODUCTORY.

558. There was no lighthouse authority for Scotland prior to the year 1786, when an Act was passed authorising the erection and maintenance of four lighthouses by certain trustees or commissioners. In England the Trinity House of Deptford Strond were interested to some extent in general seamarks as early as the year 1514, by virtue of their charter of Henry VIII. which authorised them to make laws "for the relief, increase, and augmentation of the shipping," and in 1565 they were given definite authority to erect and maintain on the seashores and uplands near the seacoasts "beacons, marks, and signs for the sea." [1] Authority to place buoys in the channels and off the shore was given by letters patent of 11th June 1594,[2] which also vested in the Trinity House the office of beaconage and buoyage; and the right to levy light dues was conferred by subsequent Crown patents and Acts of Parliament referring to particular lighthouses. For a considerable period many lighthouses in England were in the hands of private persons under patents or leases from the Crown, but in 1822 the Trinity House were authorised to purchase those lighthouses, and also to regulate and alter the light dues.[3] In 1810 they received a certain supervisory control over lighthouses in Ireland,[4] and in 1836 an Act, which was the origin of the present system of lighthouse administration, extended their control over lighthouses in both Ireland and Scotland.[5] The constitution of the Trinity House was successively regulated by the charters of Henry VIII., 1514, James I., 1604, James II., 1685, and 34 Victoria, 1871.

559. In Ireland six lighthouses were erected in the latter part of the seventeenth century, and Sir R. Reading received from Charles II. authority to levy dues for their maintenance. In 1704 these lighthouses were placed under special commissioners, and afterwards by successive Acts of the Irish and British Parliaments under various public bodies. In 1810 lighthouse administration was vested in "the Corporation for preserving and improving the Port of Dublin" (known as the Ballast Board), and new proposals had to be communicated to the Trinity House for their suggestions.[1] The Merchant Shipping Acts of 1853 and 1854 intrusted lighthouse administration to the "Port of Dublin Corporation," which was merely a new name for the old body, and the Dublin Port Act of 1867[2] changed the name to the Commissioners of Irish Lights.

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[1] 8 Eliz. c. 13.
[2] 36 Eliz.
[3] 3 Geo. IV. c. cxi. (Local).
[4] 50 Geo. III. c. 95.
[5] 6 & 7 Will. IV. c. 79.

560. In Scotland the earliest authoritative reference to lighthouses is in a Crown patent of 1635, ratified by the Scots Parliament in 1641, authorising James Maxwell and John Cunninghame to erect a light on the Isle of May and to levy dues therefor. An Act of Privy Council of 24th February 1687 empowered the fraternity of masters and seamen in Dundee to erect lights and beacons in the Firth of Tay and to levy dues on shipping, and about the same time the lights at Buddonness were erected. By the Dundee Harbour Consolidation Act, 1875, s. 81, the administration was transferred to the Trustees of the Harbour of Dundee, who now control the seamarks in the Firth of Tay. The Cumbrae Act of 1756[3] appointed trustees with power to erect a lighthouse on the Little Cumbrae and to levy dues, and out of any surplus to erect other seamarks in the Clyde. This was the origin of the Trustees of the Clyde Lighthouses, who now administer the seamarks between Port Glasgow and the Cumbraes.

561. In 1786[4] a lighthouse authority for Scotland was created, nineteen Commissioners or trustees being appointed with power to erect four lighthouses on important headlands, and to levy dues on shipping. Pladda Lighthouse in the Clyde was erected under a special Act of 1789,[5] which also gave the Commissioners power to erect other lighthouses when funds permitted, and to assume new Commissioners. In 1798[6] the Commissioners were incorporated under the title of "The Commissioners of the Northern Lighthouses," and in 1815[7] the Isle of Man was placed within their jurisdiction. The title was altered to "The Commissioners of Northern Lighthouses" by the Merchant Shipping Act, 1853.[8] Between 1836 and 1894 the administration of lighthouses was regulated by the following general Acts applying to the United Kingdom, viz. the Lighthouse Act, 1836;[9] and the Merchant Shipping Acts of 1853,[8] 1854,[10] and 1862.[11] The Board of Trade had no authority over the general authorities until 1853, and before that date the authorities were subject to no financial control, except that under the 1836 Act their accounts were laid annually before Parliament.

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[1] 50 Geo. III. c. 95.

[2] 30 & 31 Vict. c. lxxxi. (Local).

[3] 29 Geo. II. c. 20.

[4] 26 Geo. III. c. 101.

[5] 29 Geo. III. c. 52.

[6] 38 Geo. III. c. lvii. (Local).

[7] 55 Geo. III. c. lxvii. (Local).

[8] 16 & 17 Vict. c. 131.

[9] 6 & 7 Will. IV. c. 79.

[10] 17 & 18 Vict. c. 120.

[11] 25 & 26 Vict. c. 63.

SECTION 2.—GENERAL MANAGEMENT.

562. Lighthouse administration is now regulated by the Merchant Shipping Act, 1894,[1] and the Merchant Shipping (Mercantile Marine Fund) Act, 1898,[2] and unless otherwise stated the statutory references below are to the 1894 Act. In terms of the Irish Free State Constitution Act, 1922,[3] the maintenance of lighthouses and other seamarks in the Irish Free State should have been taken over by the Free State Government on 31st March 1923, and arrangements should at the same time have been made for the administration of seamarks in Northern Ireland, in respect of which the Parliament of Northern Ireland has not power to make laws.[4] The necessary changes, however, have not yet been effected, and the Commissioners of Irish Lights are still (October 1929) administering the seamarks in both the Free State and Northern Ireland.

563. "Lighthouse," in addition to the ordinary meaning of the word, includes any floating or other light exhibited for the guidance of ships, and also any sirens and any other description of fog signals, and also any addition to a lighthouse of any improved light, or any siren or any description of fog signal (s. 742). Any such addition may, for the purposes of the Act, be treated as a separate lighthouse (s. 642). "Buoys and beacons" includes all other marks and signs of the sea (s. 742).

564. Subject to the powers and rights of local lighthouse authorities,[5] the superintendence and management of lighthouses, buoys, and beacons are vested in three general lighthouse authorities, namely, throughout England and Wales, and the Channel Islands, and the adjacent seas and islands, and at Gibraltar, in the Trinity House; throughout Ireland and the adjacent seas and islands, in the Commissioners of Irish Lights; and throughout Scotland and the adjacent seas and islands, and the Isle of Man, in the Commissioners of Northern Lighthouses. These areas are referred to as "lighthouse areas" (s. 634). The authorities in Ireland and Scotland are in certain respects subject to the supervision and control of the Trinity House, and all are subject to the control of the Board of Trade (ss. 635, 636, 637, 640, 641, and 660).

565. The Commissioners of Northern Lighthouses are a body corporate with a common seal, and five constitute a quorum. The Commissioners named in the Act are the Lord Advocate and the Solicitor-General for Scotland; the Lord Provosts of Edinburgh, Glasgow, and Aberdeen, and the Provosts of Inverness and Campbeltown; the eldest bailies of Edinburgh and Glasgow; and the Sheriffs of the counties of the Lothians and Peebles; Lanark; Renfrew and Bute; Argyll; Inverness, Elgin, and Nairn; Ross, Cromarty, and Sutherland; Caithness, Orkney, and Shetland; Aberdeen, Kincardine, and Banff; Ayr; Fife and Kinross; Dumfries and Galloway; and any persons elected under the section (s. 668 (1), (2)). The Sheriff of Forfar, the Lord Provost of Dundee, the Provost of Greenock, the Provost of Leith, and the Sheriff of Roxburgh, Berwick, and Selkirk were inadvertently omitted from the 1894 Act, and were subsequently elected by the Board under their power to elect the provost or chief magistrate of any royal or parliamentary burgh on or near any part of the coasts of Scotland, and the Sheriff of any county abutting on those coasts (s. 668 (3)).

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[1] 57 & 58 Vict. c. 60.
[2] 61 & 62 Vict. c. 44.
[3] 13 Geo. V. c. 1, s. 2.
[4] Government of Ireland Act, 1920 (10 & 11 Geo. V. c. 67).
[5] See para. 576, *infra.*

SECTION 3.—GENERAL POWERS OF LIGHTHOUSE AUTHORITY.

566. Within its area a general lighthouse authority has the following "lighthouse powers": (*a*) to erect or place any lighthouse, with all requisite works, roads, and appurtenances; (*b*) to add to, alter, or remove any lighthouse; (*c*) to erect or place any buoy or beacon, or alter or remove any buoy or beacon; and (*d*) to vary the character of any lighthouse or the mode of exhibiting lights therein. Any land required for the exercise of lighthouse powers, or for the maintenance of their works, or the residence of the lightkeepers may be taken and purchased, and for that purpose the Lands Clauses Acts are incorporated with the Merchant Shipping Act, and apply to all land to be purchased under its powers. A lighthouse authority may sell land, but has no statutory authority to let it (ss. 638, 639).

567. The Commissioners of Northern Lighthouses and the Commissioners of Irish Lights are subject to certain restrictions in the exercise of their lighthouse powers. They must first submit a "scheme" to the Trinity House specifying the mode in which they propose to exercise the power, and their reason for wishing to do so. The Trinity House must report on the scheme, approving or rejecting it with or without modification, and must forward a copy of their report to the Commissioners. They must also forward to the Board of Trade a copy of the scheme and of their report and of any communications that may have passed between them and the Commissioners, and the Board of Trade may grant or withhold their sanction or give any directions in the matter they think fit. The Board of Trade's decision is communicated to the Trinity House and by them to the Commissioners. Until they have so submitted a scheme to the Trinity House and obtained the sanction of the Board of Trade, the Commissioners cannot exercise any of their lighthouse powers (s. 640). The financial sanction of the Board of Trade must also be obtained (s. 660). Financially the Trinity House are subject to the same control as the other authorities (s. 660), but they do not require to submit a "scheme" to the Board of Trade for sanction. The Trinity House may, with the sanction of the Board of Trade and after the Commissioners have had an opportunity of being heard in the matter, direct them to continue, erect, add to, alter, or remove any lighthouse, buoy, or beacon, and vary the character of any lighthouse or the mode of exhibiting lights therein (s. 641). The general authorities must give to the Board of Trade all required returns and information regarding the seamarks within their respective areas (s. 635), and the Board of Trade may inspect the same on complaint being made that any lighthouse, buoy, or beacon is inefficient, improperly managed, or unnecessary (s. 636). The Trinity House also have a right to inspect any lighthouse within the lighthouse areas (s. 637).

SECTION 4.—REVENUE.

568. All references to the Mercantile Marine Fund in Part XI. and in ss. 531 and 679 of the Merchant Shipping Act, 1894, are construed as references to the General Lighthouse Fund.[1] The revenue of the general lighthouse authorities is derived from light dues which are payable in respect of all ships except (1) Ships belonging to His Majesty or to a foreign Government unless carrying cargo or passengers for freight or fares; (2) Sailing ships (not being pleasure yachts) of less than one hundred tons, and all ships (not being pleasure yachts) of less than twenty tons; (3) Vessels (other than tugs or pleasure yachts), when navigated wholly and *bona fide* in ballast, on which no freight is earned and without any passenger; (4) Ships putting in for bunker coal, stores, or provisions for their own use on board; (5) Vessels for the time being employed for profit in sea fishing or in sea-fishing service;[2] (6) Ships putting in from stress of weather, or for the purpose of repairing, or because of damage, provided they do not discharge or load cargo other than cargo discharged with a view to such repairs and afterwards reshipped; (7) Yachts and pleasure boats of under five tons registered shipping tonnage; (8) Ships making voyages entirely in waters in which there is no seamark maintained by a general lighthouse authority at the expense of the General Lighthouse Fund; (9) Yachts laid up during the whole of any year ending 31st March; and (10) Foreign sailing yachts visiting British waters for racing purposes.[3]

569. All light dues coming into the hands of a general lighthouse authority are carried to the General Lighthouse Fund (s. 648). They are levied with respect to the voyages made by ships or by way of periodical payment, and not, as formerly, with respect to the lights which a ship passes or from which it derives benefit[4]—practically a reversion to the Scottish practice which existed until the 1836 Act substituted the English system of charging dues on account of each light passed. Tables of light dues and the regulations relating to them must be posted up at all Custom Houses in the United Kingdom (s. 647). Any person appointed to collect light dues must pay them over to the general lighthouse authority by whom he was appointed or as that authority directs; and the authority receiving the dues must cause them to be remitted to His Majesty's Paymaster-General (s. 648). By arrangement the dues for the United Kingdom are now collected by the Custom Houses and accounted for to the Trinity House. Light dues are recoverable from the owner or master of the ship, or such consignees or agents as are liable to pay any other charge on account of the ship in the port of her arrival or discharge. The consignees or agents who have paid light dues may retain the amount out of any money received on account of the ship or belonging to her owner (s. 649). The collector is entitled to poind the goods, guns, tackle, or anything belonging to or on board the ship, and if the light dues are not paid within three days, he may sell the poinded subjects and out of the proceeds pay the dues and the expenses incurred by him (s. 650). The collector must give a receipt for light dues, and a ship may be detained until the receipt is produced to the officer of Customs (s. 651). In virtue of Orders in Council at present (October 1929) in force the existing scale of light dues is higher by 30 per cent. than that fixed by the Merchant Shipping Act, 1898.

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[1] Merchant Shipping Act, 1898, s. 1 (1) (*c*).

[2] For definition of "sea fishing," see the Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), s. 5.

[3] Sec. 643; Merchant Shipping Act, 1898, s. 5 (2), and Second Schedule; Orders in Council, 24th July 1901, 4th July 1908, and 30th July 1919.

[4] Merchant Shipping Act, 1898, s. 5 (1).

SECTION 5.—EXPENSES.

570. Payment is made out of the General Lighthouse Fund of all expenses incurred by the general lighthouse authorities in the works and services of lighthouses, buoys, and beacons, or in the execution of any works necessary or expedient for the purpose of permanently reducing the expense of those works and services;[1] in the removal of wrecks, unless reimbursed as provided in ss. 530, 531 (2); and in making and maintaining communication between lighthouses and the shore.[2] The establishments of the general lighthouse authorities are fixed by Order in Council, but an increase of any establishment cannot be made without the consent of the Board of Trade (s. 659). A general lighthouse authority has power, with the sanction of the Board of Trade, to grant superannuation allowances or compensation not exceeding the rate granted to persons in the public civil service (s. 665). No expenses of a general lighthouse authority in respect of lighthouses, buoys, and beacons can be paid out of the General Lighthouse Fund unless they have been allowed as part of the establishment expenses, or an estimate or account thereof has been submitted to the Board of Trade, who may approve them with or without modification (s. 660). The Treasury may, on the application of the Board of Trade, advance sums not exceeding £200,000 for the purpose of the construction and repair of lighthouses and of other extraordinary expenses connected with lighthouses, buoys, and beacons, and such advances become a charge on the General Lighthouse Fund (s. 661 (1), (2)). For a similar purpose the Board of Trade may mortgage the fund (s. 662), and the Public Works Loan Commissioners may advance money upon such mortgage (s. 663). Such advances do not prevent any lawful reduction of light dues if the reduction is sanctioned by the Treasury or assented to by the Public Works Loan Commissioners (ss. 661 (3) and 663 (3)).

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[1] Secs. 658 and 677 (i.); Merchant Shipping Act, 1898, s. 1 (1) (*b*), (*c*).

[2] Merchant Shipping Act, 1898, s. 2 (5).

571. Each of the general lighthouse authorities must account to the Board of Trade for their receipts from light dues and for their expenditure out of the General Lighthouse Fund, in such form and at such times as the Board of Trade require, and permit their books and accounts to be inspected by that Board (s. 664). The accounts of the General Lighthouse Fund are public accounts within the meaning of s. 33 of the Exchequer and Audit Departments Act, 1866, and they are laid before Parliament annually (s. 679).

SECTION 6.—EXEMPTIONS.

SUBSECTION (1).—*Stamp Duty, Taxes, etc.*

572. All instruments used by or under the direction of the Board of Trade in carrying into effect the lighthouse provisions of the 1894 Act are exempt from stamp duty (s. 721 (*b*), (*c*)).

573. All lighthouses, buoys, beacons, and all light dues and other rates, fees, or payments accruing to or forming part of the General Lighthouse Fund, and all premises or property belonging to or occupied by any of the general lighthouse authorities or by the Board of Trade, which are used or applied for the purposes of any of the services for which those dues, rates, fees, and payments are received, and all instruments or writings used by or under the direction of any of the general lighthouse authorities or of the Board of Trade in carrying on those services, are exempted from all public, parochial, and local taxes, duties, and rates of every kind (s. 731). All vessels belonging to or used by any of the general lighthouse authorities or the Board of Trade are exempt from harbour, port, dock, and pier dues, and from harbour regulation and control (s. 732).[1] They are also exempt from certain provisions of Part II. of the Merchant Shipping Act, 1894, relating to officers' certificates, engagement of seamen, agreements with crew, official logs, etc. (s. 262).

SUBSECTION (2).—*Juries.*

574. Lightkeepers are exempted from serving upon juries.[2]

SUBSECTION (3).—*Explosives.*

575. The Explosives Act, 1875, does not apply to the keeping of any explosive kept for the purpose of signalling at or near a station on the seacoast under the control of any general lighthouse authority.[3] In practice this exemption is held to cover the conveyance of such explosives in the lighthouse vessels.

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[1] Harbours, etc., Act, 1847 (10 & 11 Vict. c. 27), s. 28.

[2] The Juries (Lighthouse Keepers' Exemption) Act, 1869 (32 & 33 Vict. c. 36), s. 1.

[3] 38 Vict. c. 17, s. 98.

SECTION 7.—LOCAL LIGHTHOUSES.

576. A local lighthouse authority is any person or body of persons having by law or usage authority over local lighthouses, buoys, or beacons (s. 634). The expression "local lighthouses" is not defined. Harbour and conservancy authorities are local lighthouse authorities in virtue of the power to erect and maintain lighthouses conferred by their special Acts and charters, but difficulties have arisen with regard to private individuals who without statutory authority have erected lighthouses for their own purposes on their own property. In practice the general authority does not take cognisance of such lighthouses as long as they are not publicly advertised, and are not misleading.

577. General lighthouse authorities must inspect all lighthouses, buoys, and beacons belonging to local lighthouse authorities within their area, and the latter must give to the general authority all required returns, explanations, and information. The results of inspections must be communicated to the local authorities and reported to the Board of Trade, and the reports are laid before Parliament (s. 652). In the Northern Lighthouse area the inspection is triennial.

578. A general lighthouse authority may, with the sanction of the Board of Trade, and after due notice, direct a local lighthouse authority to lay down buoys, or to remove or discontinue any lighthouse, buoy, or beacon, or to make any variation in their character or in the mode of exhibiting lights (s. 653 (1)). The section does not confer authority to direct the establishment of a light, but this is almost invariably given in the special Acts. A local lighthouse authority may not erect or place, or remove or discontinue, any lighthouse, buoy, or beacon, or vary their character or the mode of exhibiting lights without the sanction of the general lighthouse authority (s. 653 (2)). During the construction of harbour or pier works such lights must be exhibited as the Board of Trade may require or approve; [1] and while this does not dispense with the necessity of obtaining the sanction of the general lighthouse authority, in practice difficulties are avoided by the Board of Trade taking the advice of the general lighthouse authority in such cases.[2] If a local lighthouse authority fail to exercise its powers or to comply with the direction of a general lighthouse authority with respect to any seamark, these powers, including the power of levying dues, may, by Order in Council, be transferred to the general authority, in which case they become vested in the general authority and are subject to the same provisions as are applicable to that authority's seamarks (s. 653 (3), (4)). These provisions do not apply to buoys and beacons placed or erected for temporary purposes (s. 653 (5)), but from similar provisions in the Harbour Acts and special Acts temporary buoys are not excluded. In Scotland there has been no case of a "transfer" under s. 653 (3), and it is not a course which in ordinary circumstances would commend itself to a general lighthouse authority, but no other means are provided in the Act of putting pressure upon a local authority which declines or neglects to obey a statutory direction.

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[1] General Pier and Harbour Act, 1861, Amendment Act (24 & 25 Vict. c. 45), s. 11.

[2] Harbours, etc., Act, 1847, ss. 77 and 78.

579. A local lighthouse authority may surrender or sell any lighthouse, buoy, or beacon to the general lighthouse authority within whose area it is situated, and the general authority may, with the consent of the Board of Trade, accept or purchase it, the purchase-money being paid out of the General Lighthouse Fund (s. 654 (1 and 2)). A seamark so surrendered or sold is subject to the same provisions as if it had been provided by the general authority under their statutory powers (s. 654 (3) (*a*)).

580. The dues to be paid on account of local seamarks may, on the application of the local authority, be fixed by Order in Council, and they are paid by the same persons and recovered in the same manner as light dues levied by a general lighthouse authority. Local light dues may by Order in Council be reduced, altered, or increased, so that as far as possible they may be sufficient and not more than sufficient for payment of the expenses connected with the seamarks in respect of which the dues are levied (s. 655). The dues must be applied to the purpose of constructing, placing, maintaining, and improving the seamarks in respect of which they are levied, and a separate account of them must be kept and sent to the Board of Trade annually, or as may be required (s. 656).

SECTION 8.—LIGHTHOUSES IN COLONIES.

581. When any lighthouse, buoy, or beacon has been placed on or near the coasts of any British possession with the consent of the Legislature of that possession, an Order in Council may fix the light dues to be paid by every ship which passes and derives benefit from it, and those dues are leviable throughout His Majesty's dominions (s. 670 (1)). Colonial light dues cannot be levied in any British possession unless the local legislature has signified its approval (s. 670 (2)). They are collected and recovered in the United Kingdom, and so far as circumstances permit in British possessions, in the same manner as general light dues (s. 671), and are paid over to the Paymaster-General as the Board of Trade may direct (s. 672). Colonial light dues are carried to the General Lighthouse Fund, and all expenses incurred in connection with colonial lights are paid out of that fund.[1]

SECTION 9.—REMOVAL OF WRECKS.

582. Sec. 530 of the Merchant Shipping Act, 1894, and s. 56 of the Harbours, etc., Act, 1847,[2] confer on harbour and conservancy authorities certain powers with regard to wrecks in the waters under their control, or in or near any approach thereto. But where any vessel is sunk, stranded, or abandoned in any fairway, or on the seashore, or on or near any rock, shoal, or bank in the British Islands or any of the adjacent seas or islands, and no harbour or conservancy authority has power to deal with it, the general lighthouse authority, if in their opinion the vessel is or is likely to become an obstruction or danger to navigation or to lifeboats, may (*a*) take possession of, and raise, remove, or destroy the whole or any part of the vessel; (*b*) light or buoy the vessel or part of it until it is raised, removed, or destroyed; and (*c*) sell, in any manner they think fit, the vessel or part so raised or removed, and any other property recovered in the exercise of their powers; and out of the proceeds of the sale reimburse themselves for the expenses incurred, holding the surplus, if any, in trust for the persons entitled thereto. At least seven days' notice of sale, except in the case of perishable property, must be given in the local newspapers, and at any time before the sale the owner is entitled to have the property delivered to him at its fair market value as agreed upon with the authority or fixed by some person named by the Board of Trade. The sum so paid is deemed to be the proceeds of sale (ss. 530, 531). All expenses incurred by a general lighthouse authority and not reimbursed in the manner stated, are paid out of the General Lighthouse Fund (s. 531). Although the word "may" is used in the wreck removal provisions, they are interpreted as imposing an obligation or duty on the removal authorities.

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[1] Merchant Shipping Act, 1898, s. 2 (1), (3).

[2] 10 & 11 Vict. c. 27.

583. General lighthouse authorities have no statutory remedy against an owner personally for recovery of the expenses incurred in removing a wreck, and in this respect they are in a less favourable position than harbour and conservancy authorities, which have this power under their special Acts, and s. 56 of the Harbours, etc., Act, 1847.[1] An owner is not liable for expenses incurred in connection with a wreck which he has "abandoned."[2] Lighthouse authorities have no title to unclaimed wreck, and while statute gives authority to debit the General Lighthouse Fund with the expenses of removal, there is no authority to credit the fund with the surplus proceeds. In the case of lighthouse authorities there is no provision regarding the length of time the surplus proceeds of sale are to be held in trust, or as to their ultimate disposal if unclaimed, whereas Receivers of Wreck have definite statutory instructions on the subject. Surplus proceeds should probably be handed by the general lighthouse authority to the Receiver of Wreck, or transmitted to the Board of Trade as the general and superintending wreck authority.

584. Any question which may arise between a harbour authority and a general lighthouse authority as to their respective powers in a particular case is, on the application of either authority, finally decided by the Board of Trade (s. 533). The powers conferred for the removal of wreck are cumulative (s. 534).

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[1] 10 & 11 Vict. c. 27.

[2] *The "Crystal,"* [1894] A.C. 508; *Barraclough* v. *Brown*, [1897] A.C. 615.

SECTION 10.—OFFENCES.

SUBSECTION (1).—*Damaging Seamarks.*

585. Any person wilfully or negligently injuring any lighthouse, light, buoy, or beacon; removing, altering, destroying any lightship, buoy, or beacon; or riding by, making fast to, or running foul of any lightship or buoy, is liable to a fine not exceeding £50, in addition to making good any damage (s. 666). If a moving vessel collides with a lightship which is at anchor and shewing proper lights, there is a presumption of negligence on the part of the moving vessel.[1]

SUBSECTION (2).—*False Lights.*

586. Whenever any fire or light is liable to be mistaken for a light proceeding from a lighthouse, a general lighthouse authority may direct the owner of the place, or the person having charge of the fire or light, to extinguish or screen it, and if he fails without reasonable cause to comply with the direction he is guilty of a common nuisance and liable to a fine not exceeding £100. After seven days' notice the lighthouse authority may themselves extinguish or screen such light and recover the expense of doing so from the owner or the person in charge (s. 667).

587. These offences may be prosecuted summarily, and proceedings must be commenced within six months.[2]

SECTION 11.—NEGLIGENCE.

588. General lighthouse authorities are not by virtue of the Merchant Shipping Acts servants of the Crown so as to exempt them from actions for negligence in the performance of their statutory duties.[3]

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[1] *The* "*Indus,*" 1886, 12 P. & D. 46.

[2] Secs. 680, 683, 703; Merchant Shipping Act, 1906 (6 Edw. VII. c. 48), s. 82.

[3] *Gilbert* v. *Trinity House*, 1886, 17 Q.B.D. 795.

LIGHT LOCOMOTIVES.

See LOCOMOTIVES, MOTOR CARS.

LIGHT RAILWAYS.

See RAILWAYS AND CANALS.

LIGHT, SERVITUDE OF.

See SERVITUDES.

LIMITATION.

See PRESUMPTION.

LIMITED LIABILITY.

See COMPANY; CARRIAGE BY SEA; PARTNERSHIP.

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See DEAN OF GUILD.

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INTRODUCTION.

589. Liquidation or winding up is the process by which the corporate existence of a limited liability company is brought to an end. There are three modes of winding up: (1) winding up by the Court or compulsory winding up, (2) voluntary winding up, (3) winding up under supervision of the Court. These are still regulated by the Companies (Consolidation) Act, 1908.[1] Where not otherwise specified the references are to the sections of that Act. The new provisions introduced by the Companies Act, 1929,[2] are dealt with separately.[3]

PART I.—WINDING UP BY THE COURT.

SECTION 1.—COURTS HAVING JURISDICTION.

590. The Court having jurisdiction to wind up companies registered in Scotland is the Court of Session in either Division, or in the event of a remit to a permanent Lord Ordinary, that Lord Ordinary during session, and in time of vacation the Lord Ordinary on the Bills.[4] Where the Court makes a winding-up order it may, if it thinks fit, at any time direct all subsequent proceedings in the winding up to be taken before one of the permanent Lords Ordinary and remit the winding up to him, and thereafter for the purposes of the winding up he has all the powers and jurisdiction of the Court. He has also power to report to the Division any matter which may arise in the course of the winding up.[5] By the Companies Act, 1929, the Sheriff Court is given jurisdiction, subject to the control of the Court of Session, to wind up companies having a capital of less than £10,000.[6]

SECTION 2.—HOW AND BY WHOM APPLICATION MADE.

591. Application to the Court for the winding up of a company is made by petition presented either by the company or by any creditor or creditors, contributory or contributories, or by all or any of these parties together or separately.[7] In considering the application, and indeed throughout the winding up, the Court will have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence.[8]

SUBSECTION (1).—*Creditor's Petition.*

592. A creditor who cannot obtain payment of a debt which is admittedly due, or not genuinely disputed, is entitled *ex debito justitiæ* to a winding-up order.[9] No order will be pronounced where it is impossible that it should be of any advantage, *e.g.* where there are no assets at all. If, however, there is a reasonable possibility of any advantage being derived, the order will be made.[10] The right, however, of the creditor is not his right as an individual, but as representative of the general body of creditors, and in making an order the Court will have regard to their wishes.[1] The assignee of part of a debt may present a petition,[2] at least if the assignation has been made prior to the application being made to the Court.[3]

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[1] 8 Edw. VII. c. 69.
[2] 19 & 20 Geo. V. c. 23.
[3] See para. 703 *et seq.*, *infra.*
[4] Sec. 135
[5] Sec. 136.
[6] 19 & 20 Geo. V. c. 23, s. 166 (3).
[7] Sec. 137.
[8] Sec. 145.

[9] *Bowes* v. *Hope Life Insurance Co.*, 1865, 11 H.L.C. 389; *In re Chapel House Colliery Co.*, 1883, 24 Ch. D. 259; *In re Amalgamated Properties of Rhodesia* (1913), *Ltd.*, [1917] 2 Ch. 115.

[10] *In re Chapel House Colliery Co.*, 1883, 24 Ch. D. 259; *In re Krasnapolsky Restaurant and Winter Garden Co.*, [1892] 3 Ch. 174; *In re Crigglestone Coal Co.*, [1906] 2 Ch. 327.

593. Contingent and prospective creditors may also, subject to certain conditions,[4] petition even where their debts are not only not due at the time of the application but will only become due in future if certain payments continue to be made.[5] The debt, however, must be liquid. An illiquid claim, such as a claim for damages, will not base a winding-up order.[6] Similarly, an illegal debt will not support a petition.[7]

594. Secured creditors may present a petition without prejudice to their security.[8] Thus the holder of bearer debentures whose interest is in arrear may petition.[9] The security, however, may be so framed as to prevent the holder from petitioning, *e.g.*, where the debenture or debenture stock certificate gives no direct covenant with the company, but only with trustees of a covering deed.[10]

SUBSECTION (2).—*Contributory's Petition.*

595. A petition by a contributory is rarely found in practice, because under the Act a company possesses a domestic tribunal of its own, and except on special cause shewn the Court will not interfere with its decisions. A contributory is not, it is thought, entitled to an order *ex debito justitiœ*, and only rarely will an order be granted where the petition is opposed by the majority of the other contributories.[11] A contributory means every person liable to contribute to the assets of a company in the event of its being wound up.[12] A contributory is not entitled to present a petition unless (1) either the number of members is reduced in the case of a private company below two, or in the case of any other company below seven, or (2) the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him and registered in his name for at least six months during the eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder.[1]

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[1] *In re West Hartlepool Ironworks Co.*, 1874, L.R. 10 Ch. 618; *In re Western of Canada Oil, Lands and Works Co.*, 1873, L.R. 17 Eq. 1; *In re Chapel House Colliery Co.*, 1883, 24 Ch. D. 259.

[2] *In re Steel Wing Co.*, [1921] 1 Ch. 349.

[3] *In re Paris Skating Rink Co.*, 1877, 5 Ch. D. 959; *British Cash and Parcel Conveyors* v. *Lamson Store Service Co.*, [1908] 1 K.B. 1006.

[4] Sec. 137 (1) (*c*).

[5] *In re British Equitable Bond and Mortgage Corporation*, [1910] 1 Ch. 574.

[6] *In re Milford Docks Co.*, 1883, 23 Ch. D. 292; *In re Pen-y-ran Colliery Co.*, 1877, 6 Ch. D. 477.

[7] *In re South Wales Atlantic Steamship Co.*, 1876, 2 Ch. D. 763.

[8] *Moor* v. *Anglo-Italian Bank*, 1879, 10 Ch. D. 681.

[9] *In re Olathe Silver Mining Co.*, 1884, 27 Ch. D. 278.

[10] *In re Uruguay Central and Hygueritas Rly. Co. of Monte Video*, 1879, 11 Ch. D. 372; *In re Dunderland Iron Ore Co.*, [1909] 1 Ch. 446.

[11] Stiebel's Company Law and Precedents, 2nd ed., p. 987.

[12] Sec. 124.

596. Shares standing in the name of the contributory are deemed to be "held" by him.[2] Where under the provisions of the Act any person, as being the husband of a female contributory, is himself a contributory, and a share has during the whole or any part of the six months been held by or registered in the name of the wife, or by or in the name of a trustee for the wife or for the husband, the share is deemed to have been held by and registered in the name of the husband.[3] The bearer of a share warrant may, if the articles so provide, be deemed to be a member of the company, either to the full extent or for any purposes defined in the articles.[4] The fact that he is not beneficially interested in the shares is immaterial.[5] Stockholders are also contributories since shares include stock,[6] and persons liable to be placed on the B. list are also entitled to present a petition.[7] As a rule the question of who is a contributory is one of actual fact, and the Court will not consider whether a person claiming to be a contributory ought to have been registered or not.[8] A company may not by its articles deprive its shareholders of the right to present a winding-up petition,[9] and it is doubtful whether it may enter into an agreement precluding any of its members from making such an application.[10]

SECTION 3.—GROUNDS FOR WINDING UP.

SUBSECTION (1).—*General.*

597. A company may be wound up by the Court

(i) if the company has by special resolution so resolved;

(ii) if default is made in filing the statutory report or in holding the statutory meeting;

(iii) if the company does not commence its business within a year from its incorporation or suspends its business for a whole year;

(iv) if the number of members is reduced in the case of a private company below two, or in the case of any other company below seven;

(v) if the company is unable to pay its debts;

(vi) if the Court is of opinion that it is just and equitable that the company should be wound up.[11]

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[1] Sec. 137 (1) (*a*).

[2] *In re Wala Wynaad Indian Gold Mining Co.*, 1882, 21 Ch. D. 849.

[3] Sec. 137 (3).

[4] Sec. 37 (4).

[5] *In re Wala Wynaad Co., supra.*

[6] Sec. 285.

[7] Buckley, 9th ed., p. 321.

[8] *In re A Co.*, [1894] 2 Ch. 349.

[9] *In re Peveril Gold Mines*, [1898] 1 Ch. 122.

[10] *Welton* v. *Saffery*, [1897] A.C. 299; *Punt* v. *Symons & Co.*, [1903] 2 Ch. 506; *Baily* v. *Baily*, [1906] A.C. 35.

[11] Sec. 129.

SUBSECTION (2).—*Failure to commence Business within a Year.*

598. The mere fact that a company has not commenced business for a year, or has suspended business for a year, is not necessarily conclusive in favour of the granting of a winding-up order. The Court must be satisfied either that the company has no intention of carrying on business, or that it is impossible for it to carry on business in future.[1] In determining these matters the Court will have regard to the views of the majority of the shareholders, unless there is something unreasonable or tyrannical in their attitude.[2] Where a company is incorporated to carry on business in the United Kingdom and abroad, and has commenced business abroad, and there appears a *bona fide* intention to commence business in the United Kingdom, the mere fact that it has not actually commenced there within a year is not sufficient ground for winding up;[3] but this may be an important element influencing the Court's decision.[4]

SUBSECTION (3).—*Inability to pay Debts.*

599. A company is deemed to be unable to pay its debts

(i) if a creditor by assignment or otherwise, to whom the company is indebted in a sum exceeding £50 then due, has served on the company, by leaving the same at its registered office, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;

(ii) if in Scotland the *induciæ* of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest have expired without payment being made; or

(iii) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and in determining this the Court shall take into account the contingent and prospective liabilities of the company.[5]

600. Where the debt is *bona fide* disputed the petition will be dismissed; where there is no *bona fide* dispute the petition will be granted. *In dubio* the petition may be sisted in order that the petitioner may constitute the debt.[6] But in general the Court will not allow a winding-up petition to be used as machinery for constituting a disputed debt, or putting pressure on the company.[7] Where, however, the dispute turns on a document before the Court,[1] and the company's contention is on the face of it untenable, the Court will try the question itself.[2] It is not enough to justify winding up that the company is carrying on business at a loss,[3] or apparently that the company has called together its creditors and asked them to give further credit.[4] In deciding whether the company is unable to pay its debts the Court will consider the amount of capital which can be called up,[5] but not, it would seem, reserve capital, which can only be called up in a winding up.[6] In deciding this question contingent and prospective liabilities must be taken into account.

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[1] *In re Tomlin Patent Horse Shoe Co.*, 1865, 55 L.T. 314 ; *In re Middlesborough Assembly Rooms*, 1880, 14 Ch. D. 104.

[2] *In re Middlesborough Assembly Rooms, supra.*

[3] *In re Capital Fire Insurance Association*, 1882, 21 Ch. D. 209.

[4] *Princess of Reuss* v. *Bos*, 1871, L.R. 5 H.L. 176.

[5] Sec. 130.

[6] *Landauer & Co.* v. *Alexander & Co.*, 1919 S.C. 492.

[7] *Cuninghame* v. *Walkinshaw Oil Co.*, 1886, 14 R. 87 ; *W. & J. C. Pollok* v. *The Gaeta Pioneer Mining Co.*, 1907 S.C. 182.

SUBSECTION (4).—*Just and Equitable.*

601. These words are no longer construed as having reference to cases *ejusdem generis* with those enumerated in the preceding subsections.[7] The commonest case for the application of this subsection is where the substratum of the company is gone, *i.e.* where the main purpose of the company has become impossible of attainment. Where the memorandum contains an elaborate list of powers and objects the Court will determine what is the main or paramount object, and if it has failed, the company will be wound up,[8] even although a majority of the shareholders desire to continue.[9] Similarly, a winding-up order will be made where the company is a mere bubble never having had a proper foundation at all,[10] and where the whole basis of the company is fraudulent.[11] But the mere fact that there have been fraudulent representations in the prospectus is not sufficient to justify a winding-up order (since the company may, if they think fit, waive the fraud),[12] unless the persons guilty of the fraud control a majority of the votes.[13] Nor is it sufficient that the directors have been guilty of misconduct and are liable to make over to the company money improperly received,[14] or that the company is doing something *ultra vires.*[15]

602. A winding-up order will also be pronounced in cases where there is a complete deadlock in the management of the company.[16] The deadlock must be complete, and if there is a possible way out the Court will not interfere.[1] In general, circumstances which would justify the Court in winding up a partnership will be sufficient to justify winding up.[2]

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[1] *In re Imperial Silver Quarries,* 1868, 16 W.R. 1220.

[2] *In re Imperial Hydropathic Co.,* 1882, 49 L.T. 147.

[3] *In re Joint Stock Coal Co.,* 1869, L.R. 8 Eq. 146.

[4] *In re Phœnix Bessemer Steel Co.,* 1877, 4 Ch. D. 108, at p. 121.

[5] *In re National Live Stock Insurance Co.,* 1858, 27 L.J. Ch. 669 ; *In re European Life Assurance Co.,* 1869, L.R. 9 Eq. 122.

[6] *In re Bristol Joint Stock Bank,* 1890, 44 Ch. D. 703.

[7] *In re Yenidje Tobacco Co. Ltd.,* [1916] 2 Ch. 426.

[8] *In re German Date Coffee Co.,* 1882, 20 Ch. D. 169 ; *Cotman* v. *Brougham,* [1918] A.C. 514.

[9] *In re Haven Gold Mining Co.,* 1881, 20 Ch. D. 151.

[10] *In re Anglo-Greek Steam Co.,* 1866, L.R. 2 Eq. 1 ; *In re London and County Coal Co.,* 1866, L.R. 3 Eq. 355.

[11] *In re T. E. Brinsmead & Sons,* [1897] 1 Ch. 45 and 406.

[12] *In re Haven Gold Mining Co., supra.*

[13] *In re T. E. Brinsmead & Sons, supra ; In re Blériot Manufacturing Co.,* 1916, 32 T.L.R. 353.

[14] *In re Anglo-Greek Steam Co., supra.*

[15] *In re Pioneers of Mashonaland Syndicate,* [1893] 1 Ch. 73.

[16] *In re Sailing Ship "Kentmere,"* [1897] W.N. 58 ; *In re American Pioneer Leather Co.,* [1918] 1 Ch. 556.

603. A company may sometimes be wound up on the ground that it is commercially, though not technically, insolvent, but in such a case the petitioner must shew that there will be a substantial surplus for shareholders.[3]

SECTION 4.—EFFECTS OF WINDING UP.

SUBSECTION (1).—*Generally.*

604. A winding up by the Court is deemed to commence at the time of the presentation of the petition for the winding up.[4] The order operates in favour of all the creditors and of all the contributories as if made on the joint petition of a creditor and of a contributory,[5] and so long as there is no liquidator all the property of the company is deemed to be in the custody of the Court.[6]

SUBSECTION (2).—*Disposition of Property and Transfers of Shares.*

605. Unless the Court otherwise orders, every disposition of property of the company, including things in action, and every transfer of shares or alteration of status of its members made after the presentation of the petition, is void.[7] Under this section the Court can validate dispositions made in execution of contracts entered into before the commencement of the winding up, and persons liable to pay money [8] or to transfer property [9] are not affected. Generally the Court will validate acts done in good faith and in the ordinary course of business,[10] but not those tainted with *mala fides*.[11] Where directors have made payments which are void under this section, they are personally liable for any loss suffered by the company even though no application has been made to recover the money from the payees.[12]

606. The section does not, as between vendor and purchaser, render void a contract for the sale of shares whether made before or after winding up, but not completed by transfer; [13] but the Court may decline to rectify the register so as to substitute the name of the purchaser for that of the vendor, on the principle that as the tree falls so must it lie.[14] Speculation in the shares of a company after the presentation of the petition is not prevented, but transfers following on such transactions should not be sanctioned till the list of contributories is settled.[1]

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[1] *In re Furrier's Alliance Co.*, 1906, 51 Sol. J. 172.

[2] *In re Yenidje Tobacco Co.*, [1916] 2 Ch. 426.

[3] *In re Rica Gold Washing Co.*, 1879, 11 Ch. D. 36.

[4] Sec. 139.

[5] Sec. 138.

[6] Sec. 150 (2).

[7] Sec. 205 (2).

[8] *Mersey Steel and Iron Co.* v. *Naylor*, 1882, 9 App. Cas. 434.

[9] *In re Barned's Banking Co.*, 1867, L.R. 3 Ch. 105.

[10] *In re Liverpool Civil Service Association*, 1874, L.R. 9 Ch. 511; *In re Wiltshire Iron Co.*, 1868, L.R. 3 Ch. 443.

[11] *Daly & Co.*, 1886, 19 L.R. Ir. 83.

[12] *In re Neath Harbour Smelting and Rolling Works*, 1887, 56 L.T. 727.

[13] *Chapman* v. *Shepherd*, 1867, L.R. 2 C.P. 228; *Rudge* v. *Bowman*, 1868, L.R. 3 Q.B. 689.

[14] *Emmerson's* case, 1866, L.R. 1 Ch. 433.

SUBSECTION (3).—*Current Contracts.*

607. A winding-up order does not, it would appear, terminate trading contracts already entered into.[2] But the liquidator can only insist on the completion of the contract if he performs his part of the agreement. He may, however, repudiate the contract and let the other party sue for damages.[3]

608. With regard to contracts with servants, the winding-up order is equivalent to notice of discharge to all persons in the employment of the company.[4] The liquidator, however, and the servants may waive the effect of the notice [5] or make a new contract of service.[6] It is a question of circumstances in each case whether such waiver is to be implied.

SUBSECTION (4).—*Fraudulent Preferences.*

609. Any conveyance, mortgage, delivering of goods, payment, execution, or other act relating to property which would if made or done by or against an individual be deemed in his bankruptcy a fraudulent preference, if made or done by or against a company, is deemed in the event of its being wound up a fraudulent preference of its creditors, and is invalid accordingly.[7] The presentation of the winding-up petition is deemed to correspond with the bankruptcy of an individual.[8] Any conveyance or assignment by a company of all its property to trustees for the benefit of all its creditors is void to all intents.[9] The effect of the section is to put companies and individuals in the same position as regards fraudulent preferences, and to render both obnoxious to the common law and the statutes 1621, c. 18, 1696, c. 5, and the Bankruptcy Scotland Act, 1914.[10] See BANKRUPTCY.[11]

610. Directors are trustees for creditors to the extent and effect of applying all the assets for the benefit of creditors so far as they will go. They must not give a preference to any creditor on the eve of a liquidation,[12] nor pay a creditor on the ground that it would be a hardship to leave him to claim in the liquidation.[13] Even cash payments made in ordinary course of business may be illegal, for while it is not sufficient to warrant reduction of such a payment that both debtor and creditor knew of the debtor's insolvency at the date of payment, very little interference on the part of the creditor and want of good faith in procuring the payment to himself will be sufficient to invalidate it.[1] Nor must directors press for payment of debts due to themselves, otherwise they cease to be directors.[2] On the same principle, security deeds have been set aside, and also attempts on the part of directors to pay calls by setting against them cheques drawn in respect of directors' fees.[3]

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[1] *Rudge* v. *Bowman*, 1868, L.R. 3 Q.B. 689.

[2] *Tolhurst* v. *Associated Portland Cement Manufacturers*, [1903] A.C. 414; *British Waggon Co.* v. *Lea*, 1880, 5 Q.B.D. 149.

[3] Stiebel, ii. 1017.

[4] *Chapman's* case, 1866, L.R. 1 Eq. 346.

[5] *Harding's* case, 1867, L.R. 3 Eq. 341.

[6] *Macdowall's* case, 1886, 32 Ch. D. 366.

[7] Sec. 210 (1).

[8] Sec. 210 (2); *Anderson* v. *Western Bank of Scotland*, 1859, 21 D. 230.

[9] Sec. 210 (3).

[10] *Bank of Scotland* v. *Liquidators of Hutchison, Main & Co.*, 1914 S.C. (H.L.) 1.

[11] Vol. II., p. 93, *ante*.

[12] *In re Inns of Court Hotel Co.*, 1868, L.R. 6 Eq. 82.

[13] *In re W. Blackburn & Co.* (*Buckley's* case), [1899] 2 Ch. 725; *Sharp* v. *Jackson*, [1899] A.C. 419.

SUBSECTION (5).—*Effect on Diligence.*

611. Where a company is registered in Scotland the winding up is, in the case of a winding up by the Court as at its commencement, and in the case of a winding up subject to supervision as at the date of the presentation of the petition on which the supervision order is pronounced, equivalent to an arrestment in execution and decree of forthcoming and to an executed or completed poinding, and no arrestment or poinding of the funds or effects of the company executed on or after the sixtieth day prior to the commencement of the winding up by the Court, or to the presentation of the petition on which a supervision order is made, as the case may be, is effectual; and those funds or effects, or the proceeds of those effects if sold, must be made forthcoming to the liquidator.[4] So where a bank, after the presentation of a winding-up petition of which it had no formal intimation, allowed a company to draw out certain sums, it was held bound to account for these to the liquidator.[5]

612. The winding up is equivalent to a decree of adjudication of the heritable estates of the company for payment of the whole debts of the company, principal and interest, subject to such preferable heritable rights and securities as existed at the said dates and are valid and unchallengeable.[6] No poinding of the ground which has not been carried into execution by sale of the effects sixty days before the commencement of the winding up is available in any question with the liquidator, except to the extent of the interest on the debt for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of that term.[7] Under the section a superior poinding the ground has a preference for the current term's feu-duty and one year's arrears.[8]

SUBSECTION (6).—*Stay of Proceedings.*

613. When a winding-up order has been made, no action or proceeding may be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose.[1] This rule applies only to litigations and not to the execution of diligence.[2] The Court will grant leave to proceed only if satisfied that the question at issue can be tried more conveniently in separate proceedings than in the liquidation itself.[3] No leave is required where the liquidator himself has taken steps in the proceedings, *e.g.* by way of appeal,[4] or where the proceedings consist of putting in a counter-claim to an action by the liquidator.[5]

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[1] Per Lord Moncreiff, *Angus's Tr.* v. *Angus*, 1901, 4 F. 181.

[2] *Gaslight Improvement Co.* v. *Terrell*, 1870, L.R. 10 Eq. 168.

[3] *In re Washington Diamond Mining Co.*, [1893] 3 Ch. 95.

[4] Sec. 213 (1).

[5] *Property Investment Co. of Scotland*, 1891, 28 S.L.R. 884.

[6] Sec. 213 (2).

[7] Sec. 213 (3).

[8] *Campbell* v. *Edinburgh Parish Council*, 1911 S.C. 280.

SUBSECTION (7).—*Inspection of Books, etc.*

614. The Court may make such order for inspection by creditors and contributories of the company of its books and papers as the Court thinks just, and any books and papers in the possession of the company may be inspected by creditors or contributories accordingly, but not further or otherwise.[6] When a liquidation has commenced it is only under this section that inspection may be made either by a creditor or a contributory or a member of the public.[7] The powers given by the section are *prima facie* to be exercised for the purposes of the winding up and for the benefit of those interested in it, and not for any collateral object, *e.g.* obtaining information to enable shareholders to bring actions against directors.[8] Nor does the section enable the Court to decide any question of right as against persons other than the liquidators who have possession of the books.[9]

SUBSECTION (8).—*Criminal Proceedings.*

615. By ss. 271–277 of the Companies Act, 1929,[10] a number of statutory offences are created, and provision is made in respect of infringements thereof for the prosecution of directors, managers, officers, or members of a company who have been guilty of any of these offences.

SECTION 5.—STAY OF WINDING UP.

616. The Court may at any time after an order for winding up, on the application of any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time, on such terms and conditions as the Court thinks fit.[11] Such an order is not granted as a matter of course.

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[1] Sec. 142.

[2] *Allan* v. *Cowan*, 1892, 20 R. 36.

[3] *Radford & Bright* v. *D. M. Stevenson & Co.*, 1902, 10 S.L.T. 82; *Coclas* v. *Bruce Peebles & Co.*, 1908, 16 S.L.T. 7.

[4] *Hunter & Co.* v. *John Griffiths Cycle Co.*, 1901, 85 L.T. 141.

[5] *Mersey Steel and Iron Co.* v. *Naylor*, 1884, 9 App. Cas. 434.

[6] Sec. 221.

[7] *In re Kent Coalfields*, [1898] 1 Q.B. 754.

[8] *Halden* v. *Liqr. of Scottish Heritable Security Co.*, 1887, 14 R. 633; *In re North Brazilian Sugar Factories*, 1887, 37 Ch. D. 83.

[9] *In re North Brazilian Sugar Factories*, *supra.*

[10] 19 & 20 Geo. V. c. 23.

[11] Sec. 144.

Usually an order will not be made unless all creditors are paid or satisfied,[1] and the Court will also consider whether in the interests of commercial morality there should not be an investigation into the affairs of the company.[2]

SECTION 6.—APPLICATION OF THE PROPERTY.

617. The property of the company falls to be applied in satisfaction of its liabilities *pari passu*, and subject thereto, unless the articles otherwise provide, is distributed among the members according to their rights and interests in the company.[3] The expenses of winding up, including the remuneration of the liquidator, form in practice a first charge on the assets of the company.

SECTION 7.—LIQUIDATORS.

SUBSECTION (1).—*Appointment.*

618. For the purpose of conducting the proceedings in winding up a company, the Court appoints a liquidator or liquidators, and such an appointment may be made provisionally at any time after the presentation of a petition and before the first appointment of liquidators. If more than one liquidator is appointed the Court shall declare whether any act required to be done by the liquidator is to be done by all or any one or more of the persons appointed.[4]

619. As a rule the nominee of the petitioner is appointed liquidator, and it is no objection to his appointment that he has been secretary of the company,[5] or auditor,[6] or a director.[7] The liquidator should, as a rule, be resident in Scotland at or near the registered office of the company,[8] but where circumstances warrant the course, a liquidator residing outwith the jurisdiction may be appointed, as where the application has the support of a majority of the creditors and the nominee is peculiarly equipped for the position. Liquidators are officers of the Court, and by consenting to act subject themselves to its jurisdiction.[9] A Scottish liquidator who takes up residence in England does not thereby disqualify himself from continuing in office.[10]

SUBSECTION (2).—*Security.*

620. The Court may determine whether any and what security is to be given by a liquidator on his appointment,[11] and caution varying with the circumstances is generally required.[12]

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[1] *In re Lyric Syndicate*, 1901, 17 T.L.R. 162.

[2] *In re Telescriptor Syndicate*, [1903] 2 Ch. 174.

[3] Secs. 163, 170.

[4] Sec. 149.

[5] *Gilmour's Trs.* v. *Kilmarnock Heritable Investment Co.*, 1883, 10 R. 1221.

[6] *Broad* v. *Edinburgh Northern Tramways Co.*, 1888, 15 R. 641 ; *Argylls, Ltd.* v. *Ritchie & Whiteman*, 1914 S.C. 915.

[7] *Liqrs. of Bruce Peebles & Co.* v. *Shiells*, 1908 S.C. 692.

[8] *Barberton Development Syndicate*, 1898, 25 R. 654.

[9] *Liqrs. of Bruce Peebles & Co.*, *supra*.

[10] *Robertson*, 1875, 3 R. 17.

[11] Sec. 149 (5).

[12] Sec 149 (5).

SUBSECTION (3).—*Remuneration.*

621. The liquidator receives such salary or remuneration by way of percentage or otherwise as the Court may direct.[1]

SUBSECTION (4).—*Resignation and Removal.*

622. A liquidator appointed by the Court may resign, or on cause shewn be removed by the Court,[2] and on a vacancy occurring the Court makes a new appointment. A liquidator may resign where he is appointed without his consent,[3] and even after he has acted he may resign with the consent of the creditors, at least in a liquidation where no assets are recoverable.[4] A liquidator may be removed on cause shewn on, *e.g.*, grounds of unfitness in the wide sense of the term, either arising from personal character or from his connection with other parties, or from circumstances in which he is involved.[5] Thus a liquidator has been removed on the following grounds: that he has got himself into a compromised and complicated position as regards the liquidation,[6] that a new liquidator will be in a better position for carrying out the liquidation,[7] that all the people really interested in the winding up desire it,[8] that he has delegated his authority and resides abroad,[9] that he is insane,[10] that he prosecutes claims against the wishes of a majority of the creditors,[11] that he has quarrelled with a co-liquidator.[12] An application for the removal of a liquidator can be made only at the instance of creditors or contributories.[13]

623. The acts of a liquidator are valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification.[14] This provision protects third parties dealing with him in *bona fide* and without notice of the defect.[15]

SUBSECTION (5).—*Difference between Liquidator and Trustee in Bankruptcy.*

624. A liquidator is not a trustee; he takes under no new or independent title of property, and the right of property remains in the company for which he is administering.[1] He is put there to do the acts which the directors of the company did before their powers ceased, with this restriction, that in all he does he must have regard to the interests of the creditors of the company.[2] Accordingly, the doctrine of *tantum et tale* has no application to the liquidator, because there is no transference of property to which it can be applied. The effect of the Bankruptcy Act is to divest the bankrupt and to invest the trustee in the entire estate. But liquidators are not vested in the estate to the exclusion of the company. The estate remains vested in the company itself, and the liquidators are mere administrators of it for the purpose prescribed by the statute—that is, for equal distribution among creditors.[3]

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[1] Sec. 149 (8). [2] Sec. 149 (6). [3] *Glasgow Commercial Co.*, 1913, 1 S.L.T. 117.

[4] *Jamieson* v. *Garpel Hœmatite Co.*, 1877, 14 S.L.R. 667.

[5] *In re Sir John Moore Gold Mining Co.*, 1879, 12 Ch. D. 325.

[6] *Lysons* v. *Liqr. of the Miraflores Gold Syndicate*, 1895, 22 R. 605.

[7] *In re Adam Eyton*, 1887, 36 Ch. D. 299.

[8] *In re Marseilles Extension Rly. and Land Co.*, 1867, L.R. 4 Eq. 692; *In re Association of Land Financiers*, 1878, 10 Ch. D. 269.

[9] *In re Scotch Granite Co.*, 1867, 18 L.T. 533.

[10] *In re North Molton Mining Co.*, 1886, 54 L.T. 602.

[11] *In re Tavistock Iron Works Co.*, 1871, 24 L.T. 605; *In re Baron Cigarette Machine Co.*, 1912, 28 T.L.R. 394.

[12] *Ex parte Newitt, In re Mansel*, 1884, 14 Q.B.D. 177.

[13] *In re New de Kaap, Ltd.*, [1908] 1 Ch. 589. [14] Sec. 149 (10).

[15] *Dawson* v. *African Consolidated Land and Trading Co.*, [1898] 1 Ch. 6; *British Asbestos Co.* v. *Boyd*, [1903] 2 Ch. 439.

SECTION 8.—POWERS AND DUTIES OF LIQUIDATOR.

SUBSECTION (1).—*Duties.*

625. The duties of the liquidator are, in general, (1) to collect the assets of the company and apply them in discharge of its liabilities; and (2) to adjust the rights of the contributories among themselves, and distribute any surplus among the persons entitled thereto.[4]

626. It is the duty of the liquidator not merely to advertise for creditors, but to write to the creditors of whose existence he knows and who do not send in claims, and ask them if they have any claim.[5] Before dissolution of the company a liquidator who has distributed the assets without providing for debts is personally liable.[6] When the liquidator has disposed of the assets of the company so far as he can realise them, recovered the calls so far as he can enforce them, and paid the debts so far as he is aware of them, and has done all he can do in winding up the affairs so that he has completed his business as far as he can and is *functus officio*, then it is his duty to call a meeting with a view to the dissolution of the company.[7] Even after the dissolution the Court may at any time within two years of the date thereof make an order, upon such terms as it thinks fit, declaring the dissolution to have been void, and thereupon proceedings may be taken against a liquidator in respect of his failure to pay a debt of the company.[8] The period may be extended by the Court in the exercise of its *nobile officium*.[9] At common law, apart from the preceding statutory provision, a liquidator who is in breach of his statutory duty to pay the debts of the company is liable for damage caused thereby to a creditor or contributory.[10]

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[1] *Gray's Trs.* v. *Benhar Coal Co.*, 1881, 9 R. 225.

[2] *In re Farrow's Bank*, [1921] 2 Ch. 164.

[3] Per Lord Kinnear in *Bank of Scotland* v. *Liqrs. of Hutchison, Main & Co.*, 1914 S.C. (H.L.) 1.

[4] Secs. 163 (1), 170.

[5] *Pulsford* v. *Devenish*, [1903] 2 Ch. 625.

[6] *In re New Zealand Joint Stock and General Corporation*, 1907, 23 T.L.R. 238.

[7] *In re London and Caledonian Marine Insurance Co.*, 1879, 11 Ch. D. 140, at p. 144, per James L.J.

[8] Sec. 223 (1).

[9] *Collins Bros. & Co.*, 1916 S.C. 620.

[10] *Pulsford* v. *Devenish, supra*; *Woods* v. *Winskill*, [1913] 2 Ch. 303; *Argylls, Ltd.* v. *Coxeter*, 1913, 29 T.L.R. 355.

627. The liquidator on his appointment takes into his custody or under his control all the property and things in action to which the company is or appears to be entitled.[1] The word "property" means the same thing as the assets of the company, including all the unpaid capital recoverable from the shareholders. The past shareholders therefore are liable to contribute to the assets of the company to the extent of the amount due upon their shares towards satisfaction of its liabilities *pari passu.*[2]

SUBSECTION (2).—*Powers of Liquidator.*

(i) *General Powers.*

628. The liquidator has power with the sanction of the Court or of the committee of inspection—

(*a*) to bring or defend any action or other legal proceeding in the name and on behalf of the company;

(*b*) to carry on the business of the company so far as may be necessary for the beneficial winding up thereof;

(*c*) to appoint a solicitor or law agent to assist him in the performance of his duties;

(*d*) to sell the real and personal property and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels;

(*e*) to do all acts and to execute in the name and on behalf of the company all deeds, receipts, and other documents, and for that purpose to use where necessary the company's seal;

(*f*) to prove, rank, and claim in the bankruptcy, insolvency, or sequestration of any contributory for any balance against his estate, and to receive dividends in the bankruptcy, insolvency, or sequestration in respect of that balance as a separate debt due from the bankrupt or insolvent, and rateably with the other separate creditors;

(*g*) to draw, accept, make, and endorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made, or endorsed by or on behalf of the company in the course of its business;

(*h*) to raise on the security of the assets of the company any money requisite;

(*i*) to take out in his official name letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself;

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[1] Sec. 150 (1).

[2] *Webb* v. *Whiffin*, 1872, L.R. 5 H.L. 711.

(*j*) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.[1]

629. The exercise of these powers is subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of them. The Court may order that the liquidators may exercise any of these powers without its sanction, except the power to appoint a solicitor or law agent. Subject to the rules made under the Act, the liquidator has the same powers as the trustee on a bankrupt estate.[2]

(ii) *Litigation.*

630. The practice in Scotland is for the liquidator to sue and be sued under his own name, with the addition of his designation as liquidator of the company. Sanction of the Court must be obtained before the liquidator embarks on judicial proceedings, but he must exercise his own judgment in deciding whether to litigate, and he cannot apply to the Court for guidance.[3] A liquidator is personally liable for the expenses of a litigation even where there are no company funds from which he can indemnify himself, the principle being, as in the case of a trustee in bankruptcy, that a person in a fiduciary capacity is not allowed to litigate where there are no funds, except on condition of personal liability.[4] Accordingly, where the assets are small, a liquidator for his own protection will generally refuse to litigate unless he receives an indemnity from the parties in whose interest the litigation is to be undertaken. Decree, however, is not given in terms against the liquidator personally (since that would deprive him of his right of relief against the company) unless the liquidator is personally blameworthy.[5] The rule as to personal liability applies not only in litigations in which the liquidator has been engaged *ab initio*, but also where he has elected to continue a litigation initiated before the winding up, and if unsuccessful he is liable for the whole expenses both before and after his intervention.[6] The expenses of a successful litigant are *prima facie* to be paid in full and immediately out of the assets in priority to the general costs of the liquidation. The onus is on the liquidator to shew that the condition of the assets is such that the successful litigant is not entitled to payment, and if he shews that there are persons who have a prior right or who are entitled *pari passu* with the successful litigant, the Court will not make any order in his favour without providing for these claims.[1] A successful litigant is entitled to his expenses before those of the liquidator are paid.[2]

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[1] Sec. 151 (1) and (2).

[2] Sec. 151 (4) and (6).

[3] *S.S. "Camelot,"* 1893, 1 S.L.T. 358.

[4] *Liqr. of Consolidated Copper Co. of Canada* v. *Peddie*, 1877, 5 R. 393; *Kilmarnock Theatre Co.* v. *Buchanan*, 1907 S.C. 607.

[5] *Kilmarnock Theatre Co.* v. *Buchanan, supra.*

[6] *In re London Drapery Stores*, [1898] 2 Ch. 684.

(iii) *Power to carry on Business.*

631. The word 'necessary' is not to be taken as importing an absolutely compelling force, but what may be called a mercantile necessity, something which would be highly expedient under all the circumstances of the case for the beneficial winding up of the company. This does not, however, cover an experiment, made not with a view to the beneficial winding up of the company, but with a view to the benefit of the shareholders and the reconstruction of the company.[3] Nor does it cover the indefinite carrying on of the business.[4] The effect of the winding up seems to be that from that moment there is a quasi-bankruptcy. The property becomes no longer the company's, it is rather in the hands of the creditors, and the effect of it is that there can be no general lien against goods that come into the hands of the company after the date of the order for winding up.[5] If in carrying on the business a debt or liability is incurred by the liquidator or by the company, it must be paid in full.[6] Incomplete contracts may be completed and inchoate liabilities may be rendered absolute, and a liquidator who has completed a contract may be liable in damages for a breach which took place before the liquidation.[7] The earnings of a company after the commencement of its liquidation are reckoned as capital and not revenue.[8]

(iv) *Power to Sell.*

632. Power is given in the section to make a clean sweep of everything, and when it is exercised the liquidator ceases to have any claim in respect of alleged misfeasance on the part of directors taking place unknown to the liquidator before the date of the transaction.[9]

SECTION 9.—COMMITTEE OF INSPECTION.

633. The Companies Act, 1929, makes provision for the appointment of a committee of inspection in the winding up of a Scottish company. When a winding-up order has been made by the Court, the liquidator must summon separate meetings of the creditors and contributories for the purpose of determining whether or not an application is to be made to the Court for the appointment of a committee of inspection to act with the liquidator, and who are to be the members of the committee if appointed. Where the winding-up order has been made on the ground that the company is unable to pay its debts it is not necessary for the liquidator to summon a meeting of the contributories. The Court may make any appointment and order required to give effect to any such determination, and if there is a difference between the determinations of the meetings of the creditors and contributories in respect of the matters foresaid the Court will decide the difference and make such order as it thinks fit.[1]

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[1] *In re London Metallurgical Co.*, [1895] 1 Ch. 758.

[2] *In re Pacific Coast Syndicate*, [1913] 2 Ch. 26.

[3] *In re Wreck Recovery and Salvage Co.*, 1880, 15 Ch. D. 353; *Liqr. of Burntisland Oil Co.* v. *Dawson*, 1892, 20 R. 180.

[4] *Ex parte Emmanuel*, 1881, 17 Ch. D. 35.

[5] *Wiltshire Iron Co.* v. *Great Western Rly. Co.*, 1870, L.R. 6 Q.B. 101.

[6] *In re International Marine Hydropathic Co.*, 1884, 28 Ch. D. 470; *Ex parte Smith*, 1867, L.R. 3 Ch. 125.

[7] *In re Trent and Humber Co.*, 1868, L.R. 6 Eq. 396.

[8] *Bishop* v. *Smyrna and Kassaba Rly. Co.* (No. 2), [1895] 2 Ch. 265.

[9] *In re Park Gate Waggon Works Co.*, 1881, 17 Ch. D. 234.

634. A committee of inspection consists of creditors and contributories of the company, or persons holding general powers of attorney from creditors or contributories, in such proportions as may be agreed on by the meetings of creditors and contributories, or as, in case of difference, may be determined by the Court. Where a winding-up order has been made on the ground that a company is unable to pay its debts, the committee consists of creditors or persons holding general powers of attorney from creditors.[2]

635. The committee meets at such times as it may from time to time appoint, and failing such appointment at least once a month, and the liquidator or any member of the committee may also call a meeting of the committee as and when he thinks necessary. The committee may act by a majority of the members present at a meeting, but must not act unless a majority are present.[3]

636. A member of the committee may resign by notice in writing signed by him and delivered to the liquidator. If a member becomes bankrupt, or compounds or arranges with his creditors, or is absent from five consecutive meetings of the committee without the leave of those members who together with himself represent the creditors or contributories, as the case may be, his office thereupon becomes vacant. A member may be removed by an ordinary resolution at a meeting, of creditors if he represents creditors, or of contributories if he represents contributories, of which seven days' notice has been given, stating the object of the meeting. On a vacancy occurring in the committee the liquidator must forthwith summon a meeting of creditors or contributories, as the case may require, to fill the vacancy; but the continuing members of the committee, if not less than two, may act notwithstanding any vacancy in the committee.[4]

637. The committee of inspection has, in addition to the powers and duties conferred and imposed on it by the Act, such of the powers and duties of commissioners on a bankrupt estate as may be conferred and imposed on committees of inspection by general rules.[5]

SECTION 10.—CONTRIBUTORIES.

SUBSECTION (1).—*Who are Contributories.*

638. The term contributory means every person liable to contribute to the assets of a company in the event of its being wound up, and in all proceedings for determining, and in all proceedings prior to the final determination of, the persons who are to be deemed contributories, includes any person alleged to be a contributory.[1] The term contributory includes fully paid shareholders,[2] but they will not be put on the list if they disclaim all interest.[3] As soon as may be after making a winding-up order, the Court must settle a list of contributories, with power to rectify the register of members in all cases where rectification is required in pursuance of the Act, and must cause the assets of the company to be collected and applied in discharge of its liabilities.[4] In settling the list of contributories the Court must distinguish between persons who are contributories in their own right, and persons who are contributories as being representatives of or liable to the debts of others.[5]

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[1] 1929 Act, s. 198.
[2] *Ibid.*, s. 199 (1).
[3] *Ibid.*, sec. 199 (2), (3).
[4] *Ibid.*, sec. 199 (4) to (8).
[5] *Ibid.*, sec. 201.

639. Usually there are two lists of contributories, the A. list and the B. list. The A. list consists of the members of the company at the date of winding up who are primarily liable for the debts of the company. The B. list comprises past members who are liable under the rules set forth in the Act. The A. list is generally settled first, since it may not be necessary to settle the B. list at all,[6] but both lists may be settled together.[7] As a rule, however, before a past member can be placed on the list there must be evidence in each individual case that at the date of the winding-up order there was some debt which was due when he transferred his shares, and also that the person to whom he transferred his shares has not paid up the full amount of the shares.[8] Calls, however, may be made on past members before the list of past members is complete, and in such a way that a contributory may be obliged to pay a given sum and afterwards recover it from others in the same category as himself.[9]

SUBSECTION (2).—*Rules of Liability.*

640. The rules as to the liabilities of contributories are set forth in the Act and are as follows:—

In the event of a company being wound up every present and past member shall, subject to the provisions of this section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities, and the costs, charges, and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves with the qualifications following (that is to say):—

(i) A past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up.

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[1] Sec. 124.

[2] *In re National Savings Bank Association*, 1866, L.R. 1 Ch. 547.

[3] *In re Marlborough Club Co.*, 1868, L.R. 5 Eq. 365.

[4] Sec. 163.

[5] Sec. 163 (2).

[6] *M'Ewen's* case, 1871, L.R. 6 Ch. 582; *Wright's* case, 1868, L.R. 12 Eq. 335; *Needham's* case, 1867, L.R. 4 Eq. 135.

[7] *Andrew's* case, 1867, L.R. 3 Ch. 161.

[8] *Weston's* case, 1868, L.R. 6 Eq. 17.

[9] *Creyke's* case, 1869, L.R. 5 Ch. 63.

(ii) A past member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member.

(iii) A past member shall not be liable to contribute unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of the Act.

(iv) In the case of a company limited by shares no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member.[1]

641. The procedure in distributing the assets is as follows:—

(1) The assets of the company are divided rateably among all the creditors.

(2) If the creditors have not received payment in full a call is made on the A. contributories according to their liability under the rules, and the sums thus obtained are divided rateably among the creditors.

(3) If the creditors have still not been paid in full the liability of the B. contributories emerges, and they are required to contribute in terms of the rules.

642. All the creditors, at whatever dates their debts were contracted, are entitled to share rateably in the contributions of past members. The liability of a past member is a liability to contribute to the general assets of the company in the event of its being wound up, and not a liability to contribute to a fund appropriated (so far as creditors are concerned) for the payment of any particular debts of the company; and the rights of creditors of the company, at whatever time their debts have been contracted, are as against the company and its assets (including all contributions made to its assets by past members) similar and equal.[2] The liability, however, of past members to contribute in respect of debts contracted before they ceased to be members cannot exceed the "residuum" of those debts after writing off from them the full amount of the dividends paid out of the property in hand and the contributions of present members.[3] But while the B. contributory is not liable in respect of any debt or liability contracted after he ceased to be a member, his liability is not limited to debts and liabilities incurred after he became a member of the company.[4] A past member, even after a winding-up order has been made, can buy up the debts incurred before he ceased to be a member, and so elide his liability as a contributory.[5] This rule extends even to the case where a call has been made but not paid.[6]

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[1] Sec. 123.

[2] *Webb* v. *Whiffin*, 1872, L.R. 5 H.L. 711; *Brett's* case and *Morris'* case, 1873, L.R. 8 Ch. 800.

[3] *Ibid.*

[4] *Helbert* v. *Banner*, 1871, L.R. 5 H.L. 28.

[5] *Brett's* case, *supra*.

[6] *Marsh's* case, 1871, L.R. 3 Eq. 388.

643. All the persons who have held shares within the year are liable to be put on the B. list, and the liquidator may go to the intermediate transferors of shares in Class B. to secure payment from them and get, if he can, the whole that is due to the company out of any one of them, who, however, would have a right of indemnity against his immediate transferee.[1] A compromise between the liquidator and a transferee neither relieves the transferor from his liability as a contributory,[2] nor does it relieve the transferee from his liability to indemnify the transferor.[3] Where shares are forfeited and the articles provide that all rights and claims shall thereby be extinguished, a past member may still be liable as a contributory if the forfeiture has taken place within a year.[4] Similarly a past member may be liable in respect of shares that have been validly surrendered and cancelled.[5]

SUBSECTION (3).—*Calls.*

644. The Court may, at any time after making a winding-up order, and either before or after it has ascertained the insufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories to the extent of their liability, for payment of any money which the Court considers necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding up, and for the adjustment of the rights of contributories among themselves. In making a call, the Court may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call.[6] Subject to any right of appeal, an order made by the Court on any contributory is conclusive evidence that the money, if any thereby appearing to be due, is due.[7]

645. Where an order, interlocutor, or decree has been made for winding up a company by the Court, it is competent to the Court on production by the liquidators of a list certified by them of the names of the contributories liable in payment of any calls, and of the amount due by each contributory, and of the date when the same became due, to pronounce forthwith a decree against those contributories for payment of the sums so certified to be due.[8]

646. The liability of a contributory creates a debt accruing from the time when his liability commenced, but payable at the time when calls are made for enforcing the liability.[9] Liability begins at the date when the contributory became a member of the company,[10] but it does not ripen into a debt until the winding up.[11]

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[1] *Kellock* v. *Enthoven*, 1873, L.R. 9 Q.B. 241.

[2] *Nevill's* case, 1870, L.R. 6 Ch. 43; *Hudson's* case, 1871, L.R. 12 Eq. 1; *Helbert* v. *Banner*, *supra*.

[3] *Roberts* v. *Crowe*, 1872, L.R. 7 C.P. 629.

[4] *Creyke's* case, 1869, L.R. 5 Ch. 63; *Bridger* and *Neill's* case, 1869, L.R. 4 Ch. 266.

[5] *Beith's* case, 1878, 8 Ch. D. 334.

[6] Sec. 166.

[7] Sec. 168 (1).

[8] Sec. 179.

[9] Sec. 125.

[10] *Williams* v. *Harding*, 1866, L.R. 1 H.L. 9.

[11] *Newton* v. *Anglo-Australian Investment Co.*, [1895] A.C. 244.

SUBSECTION (4).—*Rectification of Register.*

647. Until the register is rectified the liquidator is bound to enter on the A. list the name of every person who is on the register of members.[1] Questions as to the rectification of the register group themselves under four categories.

648. (1) *Where a person is not on the register but has agreed with the company to become a member in respect of certain shares.*—Subscribers to the memorandum are included under this head, since the effect of their subscription is that they not only agree, but do actually take the shares allotted to them.[2] This rule applies even where their names are not on the register and where they have not been treated as shareholders for many years.[3] When shares have been allotted to a person in consideration of services rendered, he remains *prima facie* liable as a subscriber.[4] Similarly, liability attaches to a subscriber to whom the vendor of a property has agreed to give fully paid shares forming part of the purchase price of the property, since, by subscribing to the memorandum, he is bound to take shares from the company, and does not satisfy that obligation by taking them from someone else.[5] The liquidator may enter in the register the names of persons who have agreed to take shares, though their names were not on the register before the date of winding up.[6] But when there is no notice of allotment there is no contract, and therefore no liability.[7]

649. (2) *Where persons whose names are on the register as holders of shares have not agreed to take these shares.*—Where a contract to take shares is voidable at the instance of the shareholder on the ground, *e.g.*, of misrepresentation or fraud, the winding up bars his right of rescission except in the cases provided for in s. 86,[8] and this rule extends even to the case where the shares have been issued under an irregular resolution not challenged before the date of winding up.[9] Even before winding up, if a company is hopelessly insolvent and has stopped payment, no transfer may be registered and an action of reduction of the contract for shares on the ground of fraud comes too late.[10] Once a shareholder's name is on the register it is a matter of great difficulty for him to have it removed on the ground of some agreement, alleged to be a condition precedent to liability, made at the time he applied for the shares,[1] since such agreements are generally regarded as being merely collateral or conditions subsequent.[2]

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[1] *Ex parte Dunlop*, 1863, 8 L.T. 846; *Reese River Silver Mining Co.* v. *Smith*, 1869, L.R. 4 H.L. 64.

[2] *Fothergill's* case, 1873, L.R. 8 Ch. 270.

[3] *Evans'* case, 1867, L.R. 2 Ch. 427; *Sidney's* case, 1871, L.R. 13 Eq. 228; *Tooth's* case, 1868, 19 L.T. 599.

[4] *Bennett's* case, 1867, 16 L.T. 475.

[5] *Forbes* and *Judd's* case, 1870, L.R. 5 Ch. 270.

[6] *Davies'* case, 1872, 41 L.J. (Ch.) 659; *Ritso's* case, 1877, 4 Ch. D. 774; *Adams'* case, 1872, L.R. 13 Eq. 474.

[7] *Best's* case, 1865, 2 De G. J. & S. 650.

[8] *Oakes* v. *Turquand*, 1867, L.R. 2 H.L. 325.

[9] *In re Miller's Dale and Ashwood Dale Lime Co.*, 1885, 31 Ch. D. 211.

[10] *Nelson Mitchell* v. *City of Glasgow Bank*, 1879, 6 R. (H.L.) 66; *Tennent* v. *City of Glasgow Bank*, 1879, 6 R. (H.L.) 69.

650. A mortgagee who has agreed to lend the company money on the security of fully paid shares is not liable as a contributory when he has received certificates for fully paid shares, and even after winding up he can get his name removed from the register.[3] A *bona fide* purchaser of shares who acquires them for value as fully paid, relying on a statement in the share certificate that they are fully paid, is not liable as a contributory,[4] nor is any person taking from such a purchaser even if he himself has notice, unless there is some taint of fraud or breach of trust in the transaction.[5]

651. In cases where there has been a reconstruction which has failed wholly or in part, the liability of the persons whose names are on the register is a matter of circumstances, depending on whether the successful carrying out of the reconstruction is to be regarded as a condition precedent to the acceptance of the application for shares. Thus, if application has been made to the new company,[6] or if the certificates issued by the new company have been acknowledged and retained,[7] the failure of the reconstruction will not free from liability those persons whose names are on the register. But if application has been made to the old company,[8] or if the shareholder in the old company has made no application at all,[9] there is no liability.

652. If a contributory dies whether before or after he has been placed on the list of contributories, his personal representatives and his heirs and devisees are liable in a due course of administration to contribute to the assets of the company in discharge of his liability and are contributories accordingly.[10] Where executors themselves apply for shares, they are in all cases personally liable as contributories.[11] But where the executors are merely holders of a deceased member's shares they are liable only up to the amount of the estate and not personally unless their names are on the register and they have done some unequivocal act in the character of members of the company.[12] They have generally one of two courses open to them. They may have the shares transferred into their own names and become to all intents and purposes partners in the company, or they may on the other hand not wish to have the shares transferred into their names, and they ought then to have a reasonable time allowed them to sell the shares and to produce a purchaser who will take a transfer of them.[13] The decisive question will always be, did they authorise the placing of their names on the register? and there is no inference of personal liability from the mere form of entries in the company's ledger, or even of stock certificates issued by it (though brought to the knowledge of the person sought to be charged) and acted upon by him in the receipt of dividends.[1]

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[1] *Black & Co.'s* case, 1872, L.R. 8 Ch. 254.

[2] *Elkington's* case, 1867, L.R. 2 Ch. 511.

[3] *Bloomenthal* v. *Ford,* [1897] A.C. 156.

[4] *Burkinshaw* v. *Nicolls,* 1878, 3 App. Cas. 1004.

[5] *Barrow's* case, 1879, 14 Ch. D. 432 ; *Ex parte Sandys,* 1889, 42 Ch. D. 98.

[6] *Hare's* case, 1869, L.R. 4 Ch. 503.

[7] *Challis's* case, 1871, L.R. 6 Ch. 266.

[8] *Dougan's* case, 1873, L.R. 8 Ch. 540 ; *Alabaster's* case, 1868, L.R. 7 Eq. 273.

[9] *Drew's* case, 1867, 36 L.J. (Ch.) 785.

[10] Sec. 126 (1).

[11] Stiebel, p. 1255.

[12] *Armstrong's* case, 1849, 1 De G. & Sm. 565.

[13] *Buchan* v. *City of Glasgow Bank,* 1879, 6 R. (H.L.) 44.

653. In Scotland, notice of a trust may be entered in the register; but as this permission is for the benefit, not of the trustees but of the beneficiaries, trustees whose names appear in the register as the trustees of A. B. are nevertheless personally liable as contributories, with a right of indemnity against the trust estate.[2] A trustee whose name is on the register, and who resigns office but does not intimate the resignation to the company, remains liable as a contributory.[3] So assumed trustees may be made liable though there is no deed of transfer in their favour, if their names are on the register and if new certificates in their favour have been issued.[4] A trustee may not escape liability by resigning before the date of winding up if at the date of his resignation the company has ceased to be a going concern.[5]

654. If a contributory becomes bankrupt either before or after he has been placed on the list, his trustee in bankruptcy represents him for all the purposes of the winding up and is a contributory accordingly, and may be called on to admit to proof against the estate of the bankrupt or otherwise to allow to be paid out of the assets any money due from the bankrupt in respect of his liability to contribute to the assets of the company, including the estimated value of his liability to future calls.[6] The discharge of the bankrupt frees him entirely from liability to calls made after its date.[7]

655. (3) *Where persons have been members and either have or are alleged to have ceased to be members, and their names do not appear on the register.*—Where a person has agreed to transfer shares and the transferee has agreed to become a member and his name appears on the register, any informality in the transfer will not enable the liquidator to substitute the name of the transferor for that of the transferee.[8] So where the articles require certain formalities, *e.g.* the consent of directors to be given in a particular way, or the execution of the transfer by both transferor and transferee,[9] the omission of these formalities does not involve the rectification of the register. Where, however, a man has transferred shares into a purely fictitious name, his own name will be inserted,[10] as it will also in the cases where the transferee has not agreed to the transfer, or is incapable of agreeing.[11]

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[1] *Buchan* v. *City of Glasgow Bank*, 1879, 6 R. (H.L.) 44.

[2] *Muir* v. *City of Glasgow Bank*, 1879, 6 R. (H.L.) 21.

[3] *Ker* v. *City of Glasgow Bank*, 1879, 6 R. (H.L.) 52.

[4] *Bell* v. *City of Glasgow Bank*, 1879, 6 R. (H.L.) 55.

[5] *Mitchell* v. *City of Glasgow Bank*, 1879, 6 R. (H.L.) 60.

[6] Sec. 127.

[7] *Cresswell Ranch and Cattle Co.* v. *Balfour-Melville*, 1901, 39 S.L.R. 841.

[8] *Langer's* case, 1868, 37 L.J. (Ch.) 292; *Burnes* v. *Pennell*, 1849, 2 H.L.C. 497.

[9] *Bargate* v. *Shortridge*, 1855, 5 H.L.C. 297; *In re Taurine Co.*, 1883, 25 Ch. D. 118.

[10] *Arthur* v. *Midland Rly. Co.* 1857, 3 K. & J. 204.

[11] *Lumsden* v. *Buchanan*, 1865, 4 Macq. 950; *Cuninghame* v. *City of Glasgow Bank*, 1879, 6 R. (H.L.) 98.

656. Where shares have been transferred to a transferee of full age and capable of accepting a transfer the following rules apply:—[1]

(*a*) Where the articles contain no power to the directors to refuse to register a transfer, the liquidator cannot put the transferor's name on the list, provided there is an out-and-out transfer.

(*b*) Where the articles contain power to refuse to register, the transferor's name cannot be put on the list unless he has, actively by fraud, or passively by concealment, induced the directors to pass and register a transfer which they would otherwise have refused to register.

(*c*) Where the transferor has transferred to a man of straw upon an opportunity obtained by him fraudulently or in breach of some duty which he owed to the company (*e.g.* a director transferring shares in the knowledge that a call was to be made), the transferor's name may be put on the register.

657. (4) *Where persons have been members and their names are on the register at the date of winding up, but it is alleged that their names ought not to be on the register, in respect that they got rid of their shares before that date.*—If shares have been sold and a transfer has been presented for registration before the winding up, but owing to the default of the company has not been registered, the register will be rectified in favour of the transferor.[2] This rule holds even when the directors have a discretion to refuse transfers, for the Court will not assume that the directors would have refused unless there is some reason for the refusal.[3] But a transfer executed before winding up, but after the company has become hopelessly insolvent and has stopped business, may be refused.[4] What amounts to default on the part of the company is a matter of circumstances.[5] The Court will not rectify the register at the instance of a transferee where his conduct has been such as to make it inequitable to give him relief.[6]

SUBSECTION (5).—*Competing Claims of Creditors and Contributories.*

658. A sum due to a member in his character of member by way of dividends is not deemed to be a debt of the company payable in competition between himself and any creditor not a member of the company.[7] Directors' fees, however, are not struck at by the section, since they are payable to the director not in his capacity as a member of the company but in his character as a director and in return for services rendered.[8]

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[1] *Lindlar's* case, [1910] 1 Ch. 312.

[2] Sec. 32 (1); *In re Manchester and Oldham Bank*, 1885, 54 L.J. (Ch.) 926.

[3] *Evans* v. *Wood*, 1868, L.R. 5 Eq. 9; *Paine* v. *Hutchinson*, 1868, L.R. 3 Ch. 388.

[4] *Nelson Mitchell* v. *City of Glasgow Bank*, 1879, 6 R. (H.L.) 66.

[5] Stiebel, p. 1275.

[6] *Ex parte Parker*, 1867, L.R. 2 Ch. 685.

[7] Sec. 123 (1) (vii).

[8] *Dale* v. *Plant*, 1889, 43 Ch. D. 255; *In re Dover Coalfield Extension*, [1907] 2 Ch. 76; [1908] 1 Ch. 65.

SUBSECTION (6).—*Set off—Debts and Calls.*

659. A debt cannot be set off against a call in any kind of winding up, whether the call is made before or after the commencement of winding up, until the creditors are paid in full.[1] The principle underlying the rule appears to be that where an estate is being administered by the Court, or where a fund is being distributed, a party cannot take anything out of the fund until he makes good what he owes to it.[2] A shareholder who is also a creditor under a contract is not entitled to set off the debt due to him against calls, nor to set off against the calls a dividend which may hereafter come to him. But on payment of all calls which have become due he is entitled to receive dividends at the same time and rate with other creditors.[3] A contributory who is liable for calls in a winding up may, however, take an assignation of a debt due by the company and set it off against his liability as a contributory,[4] and in such a case he may rank for the full amount of the debt irrespective of the price which he has actually paid for it.[5]

660. The rule against set-off applies even where the shares were issued under a contract to allow set-off.[6] The rule does not apply to a trustee in bankruptcy, who may set off a debt due to a bankrupt contributory though the contributory himself could not have done so.[7] Nor does it apply where the debts are validly set off before the winding up begins.[8] Where the company acts as the contributory's banker, opening an account with him into which dividends and other miscellaneous receipts are paid by him, the amount at his credit may be set off against a call.[9] The rule applies also to counterclaims.[10] Before a contributory can receive any dividend he must either have paid all his calls in full,[11] or the amount already paid plus the dividend to which he is entitled on his debt must be equal to the amount due by him in respect of calls.[12] The liferenter of shares, however, is not prevented from drawing the dividends by the failure of the owner of the shares to pay calls.[13] With regard to calls made but not paid before winding up, the Court has a discretion under s. 165, once the creditors are paid in full, as to whether set-off will be allowed.[14] Where the calls are made in the winding up the section has no application.[15]

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[1] Sec. 165 (3); *In re Whitehouse & Co.*, 1878, 9 Ch. D. 595; *Hoby* v. *Birch*, 1890, 59 L.J. Q.B. 247.

[2] *In re Rhodesia Gold Fields*, [1910] 1 Ch. 239.

[3] *Grissell's* case, 1866, L.R. 1 Ch. 528.

[4] *In re Railway Time Tables Publishing Co.*, [1899] 1 Ch. 108.

[5] *In re Humber Ironworks Co.*, 1869, L.R. 8 Eq. 122.

[6] *In re Law Car and General Insurance Corporation*, [1912] 1 Ch. 405.

[7] *In re Duckworth*, 1867, L.R. 2 Ch. 578.

[8] *Blakeley's* case, 1868, 17 L.T. 307; *Ramwell's* case, 1881, 50 L.J. Ch. 827.

[9] *Liqr. of Wilsons (Glasgow and Trinidad)* v. *Wilson's Trs.*, 1915, 1 S.L.T. 424.

[10] *Government Security Investment Co.* v. *Dempsey*, 1888, 50 L.J. Q.B. 199.

[11] *Grissell's* case, *supra.*

[12] *In re Leeds and Hanley Theatre of Varieties*, [1904] 2 Ch. 45.

[13] *Ex parte Molyneux*, 1869, 19 L.T. 445.

[14] *Brasnett's* case, 1886, 53 L.T. 569.

[15] *Ex parte Branwhite*, 1879, 48 L.J. Ch. 463.

SUBSECTION (7).—*Arrest of Contributory.*

661. The Court may at any time, either before or after making a winding-up order, on proof of probable cause for believing that a contributory is about to quit the United Kingdom or otherwise to abscond, or to remove or conceal any of his property for the purpose of avoiding payment of calls or of avoiding an examination respecting the affairs of the company, cause the contributory to be arrested, and his books and papers and moveable personal property to be seized, and then and there to be safely kept until such time as the Court may order.[1]

SECTION 11.—COMPROMISES.

662. With the consent of the Court the liquidator may make any compromise or arrangement with creditors. He may also compromise all calls and liabilities to calls, debts and claims subsisting between the company and a contributory or other debtor, and all questions in any way relating to or affecting the assets of the winding up of the company, on such terms as may be agreed.[2] Where a compromise is proposed, the Court may order a meeting of the creditors or the members, as the case may be, and if a majority in number, representing three-fourths in value of the creditors or members present, either in person or by proxy, at the meeting agree to any compromise it is, if sanctioned by the Court, binding on all the creditors and members and on the liquidator and contributories.[3]

663. These sections provide that a company by its official liquidator, with the sanction of the Court, is to have exactly the same power of compromising both with its creditors and its debtors as an individual would have.[4] The liquidator cannot be forced to compromise, and the power of the Court is confined to giving approval to compromises submitted for approval by him.[5] The Court will not interfere with the discretion of a liquidator in making a compromise where it is made in good faith and is not *ultra vires*,[6] even where the claim compromised might have been successfully pressed.[7] A compromise does not affect the liability of an A. contributory to indemnify his transferor on the B. list.[8] Parties compromising with the liquidator are entitled to assume that he has observed all the necessary forms.[9] It is usual for liquidators to present compromises in batches for sanction by the Court, but no general power to compromise will be granted.[10] The liquidator ought to disclose to the Court all material circumstances affecting the proposed compromise,[1] and where this is not done, whether innocently or by design, the compromise, even when sanctioned, will fall, where matters are entire.[2]

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[1] Sec. 176.
[2] Sec. 214.
[3] Sec. 120 (2).
[4] *In re Albert Life Assurance Co.*, 1871, L.R. 6 Ch. 381.
[5] *Tennent* v. *City of Glasgow Bank*, 1879, 6 R. 972.
[6] *Lord Advocate* v. *Wemyss*, 1899, 2 F. (H.L.) 1.
[7] *Miles* v. *New Zealand Alford Estate Co.*, 1886, 32 Ch. D. 266.
[8] *Roberts* v. *Crowe*, 1872, L.R. 7 C.P. 629.
[9] *Cyclemakers Co-operative Supply Co.* v. *Sims*, [1903] 1 K.B. 477.
[10] *Pattison's, Ltd.*, 1899, 6 S.L.T. 372 ; *T. H. Burnett & Co.*, 1905, 13 S.L.T. 718.

664. In class compromises under s. 120 the Court will give the term "class" such meaning as will prevent the section being so worked as to result in confiscation or injustice, and as will confine it to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.[3] The Court must look at the scheme and see whether the Act has been complied with, whether the majority are acting *bona fide*, or whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it.[4]

SECTION 12.—DISTRIBUTION OF ASSETS.

SUBSECTION (1).—*General.*

665. Subject to the rights of secured creditors, all costs, charges, and expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the assets in priority to all other claims.[5] If the assets are insufficient to meet the liabilities, the Court may make an order as to the payment out of the assets of the costs, charges, and expenses, in such order of priority as it thinks just.[6] The property of the company falls to be applied in satisfaction of its liabilities *pari passu*, and subject thereto is, unless the articles otherwise provide, divided among the members according to their rights and interests in the company.[7] These rules apply in terms only to voluntary winding up, but they are equally applicable to the case of a compulsory liquidation.[8]

SUBSECTION (2).—*Secured Creditors.*

666. The rights of competing creditors in a liquidation are governed by the same rules as regulate the rights of creditors in a sequestrated estate under the Bankruptcy Acts. "These are well established and familiar. The general object of the statutes, as Lord Pres. M'Neill states it in *Littlejohn* v. *Black*,[9] was 'to preserve as far as possible all rights and interests in the position in which they stood the moment before bankruptcy.' From that moment no preference could be acquired by any creditor, or executed by the bankrupt. But the earlier Act, with which he was at the time concerned, as well as that now in force, 'abstained from disturbing any securities or preferences honestly obtained and lawfully completed according to the nature of such securities or preferences.' Rights in security which have been effectually completed before the liquidation must still receive the effect which the law gives to them. But the company and its liquidators are just as completely disabled by the winding up from granting new or completing imperfect rights in security as the individual bankrupt is by his bankruptcy. This, indeed, is the necessary effect of the express provision of the Companies Act, that the estate is to be distributed among the creditors *pari passu*. Every creditor is to have an equal share, unless any one has already a part of the estate in his hands by virtue of an effective legal right."[1] Section 213 of the Act makes provision for the rights of certain classes of secured creditors.

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[1] *R. W. Simpson, Ltd., Liqr. of*, v. *Hudson Beare*, 1908, 45 S.L.R. 424.

[2] *Clark* v. *Hinde, Milne & Co.*, 1884, 12 R. 347; *D. and W. Henderson & Co.* v. *Stewart*, 1894, 22 R. 154; *R. W. Simpson, Ltd., supra.*

[3] *Sovereign Life Assurance Co.* v. *Dodd*, [1892] 2 Q.B. 573.

[4] *In re Alabama, New Orleans, etc., Rly. Co.*, [1891] 1 Ch. 213.

[5] Sec. 196.

[6] Secs. 171, 193.

[7] Sec. 186 (1).

[8] *Webb* v. *Whiffin*, 1872, L.R. 5 H.L. 711; *Birch* v. *Cropper*, 1889, 14 App. Cas. 525.

[9] 1855, 18 D. 207.

667. With regard to the rules relating to voting and ranking for payment of dividends, see SEQUESTRATION.

SUBSECTION (3).—*Preferential Claims.*

668. In a winding up there must be paid in priority to all other debts—

(*a*) All parochial or other local rates due from the company at the date of the winding up, and having become due and payable within twelve months next before that date, and all assessed taxes, land tax, property or income tax assessed on the company up to the fifth day of April next before that date and not exceeding in the whole one year's assessment;

(*b*) All wages or salary of any clerk or servant, in respect of services rendered to the company during four months next before the date of winding up, not exceeding £50; and

(*c*) All wages of any workman or labourer not exceeding £25, whether payable for time- or for piece-work, in respect of services rendered to the company during two months next before the date of winding up; but where any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring he will have priority in respect of the whole of such sum, or a part thereof as the Court may decide to be due under the contract proportionate to the time of service up to that date; and

(*d*) Unless the company is being wound up voluntarily merely for the purposes of reconstruction, or of amalgamation with another company, all amounts not exceeding in any individual case £100 due in respect of compensation under the Workmen's Compensation Act, 1906, the liability wherefor accrued before the date of winding up, and all contributions payable by the company under the National Insurance Act, 1911.

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[1] *Bank of Scotland* v. *Liqrs. of Hutchison, Main & Co.*, 1914 S.C. (H.L.) 1, per Lord Kinnear.

These debts rank equally among themselves and are to be paid in full unless the assets are insufficient to meet them, in which case they abate in equal proportions.[1] Debts other than secured or preferential debts rank *pari passu* in accordance with the ordinary rules of bankruptcy.

SUBSECTION (4).—*Compensation.*

See SEQUESTRATION.

SUBSECTION (5).—*Rights of Contributories.*

669. After paying all the costs, charges, and expenses of the liquidation, the liquidator adjusts the rights of the contributories among themselves and distributes any surplus among the persons entitled thereto.[2] Shareholders are liable to calls for the amounts unpaid for the adjustment of the rights of contributories as well as for the payment of creditors; and a provision in the articles to the effect that calls shall not be made except for payment of debts is void.[3]

670. The property of the company, which includes uncalled capital,[4] is divided thus:

If it is not sufficient to repay to the contributories the amounts paid up by them, the loss is divided in proportion to the number of shares held by them; and where some shares are fully paid and others not, the holders of the fully paid shares are entitled to repayment of the excess before the other shareholders participate in the assets.[5] Where a contributory becomes bankrupt and a dividend is paid by his trustee in respect of calls, the bankrupt's shares are not treated as fully paid up so as to entitle the trustee to share in the surplus assets till the amount paid to the holders of fully paid shares is reduced to the amount which has been in fact paid on the bankrupt's shares.[6]

If the property is sufficient to repay the contributories, the surplus is divided according to the number of shares held, not according to the amounts paid thereon.[7]

671. Where the shares are of unequal nominal value the loss or surplus will be borne or paid rateably in proportion to the nominal amounts of the shares. Thus in a winding up the share capital consisted of 30,000 shares of £1 and 24,000 shares of £5 on which £1 was paid up, and power was given to the directors to receive payments in advance of calls. There was a surplus less than the total amount of called-up capital, and it was held that it fell to be distributed—(*a*) in repayment to the £5 shareholders who had made advances beyond £1 per share of such advances; (*b*) in payment to the £1 shareholders of 16s. so as to equate them with the £5 shareholders; (*c*) in payment to the £5 shareholders and the £1 shareholders *pro rata*, treating each £5 shareholder as if he were the owner of five £1 shares.[1] Provisions in the memorandum and articles regulating the distribution of dividends will not affect these rules, and no regard is had to premiums paid by the shareholders.[2] The ordinary rules, however, may be altered by the articles, *e.g.* these may contain a provision that surplus assets shall be divisible according to the amount paid up on each share. What is meant by surplus assets is in each case a question of construction, but it seems always to include uncalled capital.[3] Thus it may mean the surplus remaining after paying the expenses of the liquidation and the debts of the company,[4] or after paying the expenses, debts, and paid-up capital.[5] The expression "assets" includes profits made by the company,[6] and the "amount paid up on shares" means *prima facie* the amount paid up either before or during the winding up.[7]

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[1] Sec. 209.
[2] Sec. 170.
[3] *Welton* v. *Saffery*, [1897] A.C. 299.
[4] *Webb* v. *Whiffin*, 1872, L.R. H.L. 711.
[5] *Ex parte Maude*, 1870, L.R. 6 Ch. 51.
[6] *Rowe's Tr.'s* claim, [1906] 1 Ch. 1.
[7] *Birch* v. *Cropper*, 1889, 14 App. Cas. 525.

672. Holders of shares entitled to a preference in dividend are not on that account entitled to a preference in the distribution of the assets.[8] Where there is a surplus, preference shareholders share equally with ordinary shareholders whether there is a provision giving them priority for repayment of capital or not.[9]

673. In a winding up, the expression "profits" means any increase which the assets of a company shew at one date as compared with another, due allowance being made for any capital introduced into or taken out of the business in the meanwhile.[10] It also includes profits made before winding up but not realised till afterwards, and any excess which the assets of the company shew over the value assigned to them in the books.[10] The capital value of goodwill, however, is an alternative to profits and not part of them, since it is the price at which a person renounces his rights to future profits.[10] Earnings since the commencement of the liquidation are capital, not income.[11]

674. Where profits are carried to reserve, questions may arise as to the distribution in a winding up. Carrying undrawn profits to a suspense account or a reserve account, *e.g.* for depreciation, insurance, or improvements, does not necessarily change their character, still less their ownership; they remain the undrawn profits of those persons to whom they belonged, dedicated no doubt to certain purposes and applicable to those purposes but not otherwise altered in their character or ownership. If the purposes for which such profits are set apart fail, or if the profits are not required for such purposes, they become divisible, not as capital but as undrawn profits. Where capital and profits belong to the same persons and in the same proportions, it becomes unimportant to distinguish the one from the other, and capitalisation for convenience may be inferred from slight evidence. But where capital and profits belong to different persons the effect of capitalising profits is to change their ownership, and an intention to do this must be shewn before conversion of profits into capital can properly be inferred. Moreover, this is a matter in which a majority cannot bind a minority unless expressly empowered to do so by the constitution of the company.[1] The matter, however, depends on the construction of the articles,[2] and as a rule shareholders will not be entitled to claim reserve fund *qua* profits where no dividend has been declared before the winding-up, for the shareholder has no right to any payment until the corporate body has determined that the money can properly be paid away.[3] Except with the consent of all the contributories, the assets may not be applied in giving gratuities for past services to servants, who may, however, be remunerated for services in the winding up.[4]

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[1] *In re Wakefield Rolling Stock Co.*, [1892] 3 Ch. 165.

[2] *In re Driffield Gas Light Co.*, [1898] 1 Ch. 451.

[3] *Ex parte Lowenfeld*, 1893, 70 L.T. 3; *Welton* v. *Saffery*, [1897] A.C. 299.

[4] *In re Crichton's Oil Co.*, [1902] 2 Ch. 86.

[5] *In re Anglo-Continental Corporation of Western Australia*, [1898] 1 Ch. 327.

[6] *Robertson-Durham* v. *Inches*, 1917, 1 S.L.T. 267.

[7] *Ex parte Lowenfeld, supra.*

[8] *In re London India Rubber Co.*, 1867, L.R. 5 Eq. 519; *In re Accrington Corporation Steam Tramways Co.*, [1909] 2 Ch. 40.

[9] *Birch* v. *Cropper, supra*; *In re Fraser & Chalmers, Ltd.*, [1919] 2 Ch. 114.

[10] *In re Spanish Prospecting Co.*, [1911] 1 Ch. 92.

[11] *Bishop* v. *Smyrna and Kassaba Rly. Co.* (No. 2), [1895] 2 Ch. 596.

SECTION 13.—DISSOLUTION OF COMPANY.

675. When a company has been wound up and is about to be dissolved, the books and papers of the company may be disposed of in such way as the Court directs. After five years from the dissolution no responsibility rests on the company or the liquidators, or any person to whom the custody of the books and papers has been committed, by reason of the same not being forthcoming to any person claiming to be interested therein.[5] When the affairs of the company have been completely wound up, the Court makes an order that the company be dissolved from the date of the order, and the company is dissolved accordingly. The order must be reported by the liquidator to the Registrar of Companies, who then makes in his books a minute of the dissolution of the company.

676. When a company has been dissolved, the Court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the Court to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.[6]

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[1] *In re Bridgewater Navigation Co.*, [1891] 2 Ch. 317.

[2] *In re National Telephone Co.*, [1914] 1 Ch. 755.

[3] *Bond* v. *Barrow Hæmatite Steel Co.*, [1902] 1 Ch. 353; *In re Accrington Corporation Steam Tramways Co.*, [1909] 2 Ch. 40.

[4] *Hutton* v. *West Cork Rly. Co.*, 1883, 23 Ch. D. 654.

[5] Sec. 222.

[6] Sec. 223.

PART II.—VOLUNTARY WINDING UP.

Section 1.—Grounds for Winding Up.

677. A company may be wound up voluntarily—

(1) When the period, if any, fixed for the duration of the company by the articles expires, or the event, if any, occurs on the occurrence of which the articles provide that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily.

(2) If the company resolves by special resolution that the company be wound up voluntarily.

(3) If the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up.[1] The winding up may be carried on either by the company itself or by the company under supervision of the Court.

Section 2.—Date of Winding Up.

678. The winding up is deemed to commence at the time of the passing of the resolution authorising it,[2] *i.e.* in the case of a special resolution, at the date of the confirmatory resolutions.[3] Notice of the resolution to wind up must be given in the *Gazette*.[4] In the case of a winding up subject to supervision, the winding up dates from the presentation of the petition [5] where questions of fraudulent preference are involved. Where no such questions are raised, the winding up dates from the confirmatory resolution even where a petition has been presented at an earlier date.[6]

Section 3.—Differences between Voluntary Winding Up and Winding Up Subject to Supervision.

679. The main differences between a voluntary winding up and a winding up subject to supervision are these—

(1) In a winding up subject to supervision no proceeding may be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose,[7] and the provisions of s. 213 with regard to diligence are applicable. These results do not follow in the case of a voluntary winding up, but the liquidator or any contributory or creditor may apply to the Court to determine any question

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[1] Sec. 182.

[2] Sec. 183.

[3] *Hornby's* case, 1868, 37 L.J. (Ch.) 929; *Dawes'* case, 1868, L.R. 6 Eq. 232.

[4] Sec. 185.

[5] Secs. 210 (2), 213.

[6] *In re West Cumberland Iron and Steel Co.*, 1889, 40 Ch. D. 361.

[7] Secs. 142, 203 (2).

arising in the winding up, or to exercise as respects the enforcing of calls or any other matter all or any of the powers which the Court might exercise if the company were being wound up by the Court.[1] The Companies Act, 1929, provides that if the Court on the application of the liquidator so directs, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose.[2] Under s. 193 the Court will usually stay proceedings on the same principles as are applied in the case of compulsory winding up.[3] It would seem that in a voluntary winding up the onus is on the liquidator to shew that the action should be stayed, at least where liability is totally denied; in winding up subject to supervision the onus is on the creditor to shew that the action should be allowed to proceed.[4] Where leave to proceed would be given in a compulsory winding up, proceedings will not be stayed in a voluntary winding up.[5]

(2) In a winding up subject to supervision the liquidator must submit the whole of his accounts to the Court.

(3) In a voluntary winding up every transfer of shares, except transfers made to or with the sanction of the liquidator, and every alteration in the status of the members of the company made after the commencement of the winding up is void.[6] In a winding up subject to supervision every disposition of the property of the company and every transfer of shares or alteration in the status of its members made after the commencement of the winding up is void unless the Court otherwise orders.[7]

(4) The provisions of s. 213 apply to winding up under supervision, but not to voluntary winding up.

(5) In a winding up subject to supervision compromises or arrangements made under s. 214 require the sanction of the Court; in a voluntary winding up they require the sanction of an extraordinary resolution.[8]

(6) When a company has been wound up and is about to be dissolved the books and papers of the company are, in the case of a winding up subject to supervision, disposed of in such way as the Court directs, and in the case of a voluntary winding up in such way as the company by extraordinary resolution directs.[9]

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[1] Sec. 193.

[2] 1929 Act, s. 253 (1).

[3] *In re Poole Firebrick and Blue Clay Co.*, 1873, L.R. 17 Eq. 268; *In re Thurso New Gas Co.*, 1889, 42 Ch. D. 486; *In re Roundwood Colliery Co.*, [1897] 1 Ch. 373.

[4] *Currie* v. *Consolidated Kent Collieries Corporation*, [1906] 1 K.B. 134.

[5] *Levick's* case, 1867, L.R. 5 Eq. 69; *Ex parte Smith*, 1867, L.R. 3 Ch. 125.

[6] Sec. 205 (1).

[7] Sec. 205 (2).

[8] Sec. 214.

[9] Sec. 222 (1).

SECTION 4.—APPLICATIONS TO THE COURT.

680. In a voluntary winding up all applications made to the Court are brought under s. 193.[1] The application is made by petition to either Division of the Court of Session, and the section can be invoked on any question which fairly arises in the course of a winding up.[2] A liquidator applying under the section does not require to find caution for expenses,[3] but such security is demanded when the application is made by a creditor resident abroad.[4] Under this section such questions have been settled as the granting of an order for the production of documents under s. 174,[5] or for the inspection of books under s. 221,[6] the determination of the rights of an alleged dissentient,[7] and the appointment of an additional liquidator.[8] Under the section also an appeal may be taken from the decision of a liquidator on the claim of a creditor.[9] But the Court will refuse to try an application to set aside a contract,[10] or to try a question of fact, *e.g.* of wrongful dismissal.[11]

SECTION 5.—RESOLUTIONS FOR WINDING UP.

SUBSECTION (1).—*Notices.*

681. With regard to the rules as to meetings and notices of meetings, see COMPANY.[12] A resolution to wind up is invalid if notice of the meeting was sent out by an unauthorised person.[13] When the company is to be wound up by extraordinary resolution on the ground that it cannot by reason of liabilities continue business, the notice of the meeting must clearly state that the resolution will not require to be confirmed at a second meeting.[14] The notice, however, will be good if it follows the terms of s. 182 (3).[15] The failure of a scheme of reconstruction of which the liquidation is a part does not invalidate the liquidation when the winding-up resolution is entirely separate from the reconstruction.[16] But where the winding-up scheme is stated to be for the purpose of reconstruction, the failure of the scheme may also involve the failure of the liquidation.[1]

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[1] *In re New de Kaap Co.*, [1908] 1 Ch. 589.

[2] *In re Union Bank of Kingston-upon-Hull*, 1880, 13 Ch. D. 808.

[3] *In re Strand Wood Co.*, [1904] 2 Ch. 1.

[4] *In re Pretoria Pietersburg Rly. Co.* (No. 2), [1904] 2 Ch. 359.

[5] *In re Sir John Moore Gold Mining Co.*, 1878, 37 L.T. 242.

[6] *In re Kent Coalfields Syndicate*, [1898] 1 Q.B. 754.

[7] *In re Union Bank of Kingston-upon-Hull*, *supra.*

[8] *In re Sunlight Incandescent Gas Lamp Co.*, [1900] 2 Ch. 728.

[9] *Bloch Bros., Petrs.*, 1928, unreported.

[10] *In re Centrifugal Butter Co.*, [1913] 1 Ch. 188.

[11] *Crawford* v. *M'Culloch*, 1909 S.C. 1063.

[12] Vol. IV., p. 1, *ante.*

[13] *In re Haycraft Gold Reductions and Mining Co.*, [1900] 2 Ch. 230; *In re State of Wyoming Syndicate*, [1901] 2 Ch. 431.

[14] *In re Bridport Old Brewery Co.*, 1867, L.R. 2 Ch. 191; *In re Silkstone Fall Colliery Co.*, 1875, 1 Ch. D. 38.

[15] *Stone* v. *City and County Bank*, 1877, 3 C.P.D. 282.

[16] *Thomson* v. *Henderson's Transvaal Estates*, [1908] 1 Ch. 765.

SUBSECTION (2).—*Proxies.*

682. At meetings of a company the ordinary method of voting is by a show of hands, and in such a case where no poll is demanded no account is taken of the proxies held.[2] The articles of a company usually make provision for voting by proxy,[3] and in default of such provision no member is entitled so to vote.[4] The articles will also, as a rule, provide the form of proxy and the conditions under which it is to be exercised. Proxies are generally required to be members of the company, but it is sufficient compliance with this condition if there is membership at the date when the proxy is to be used.[5]

683. The rules contained in the articles as to the use of proxies must be strictly observed. Thus, where the articles require the proxy to be signed in the presence of a witness, it will be rejected if it is unattested.[6] In the case of a corporation a proxy may be required to be given under seal, but where the corporation is a foreign one having no common seal the absence of the seal will not invalidate the proxy.[7] A proxy paper, signed in blank and handed over to someone with authority to fill up the blank, is effective if the blank has been properly filled in when the proxy paper is deposited or used.[8] Directors acting in good faith in the interests of the company may, at the expense of the company, send out stamped proxy forms filled up with their own names.[9]

684. Where a proxy is to be used at any one meeting or adjournment thereof, the instrument must bear a penny stamp, which must be cancelled by the person executing it. It must state the day of the meeting, and it is only available at that meeting and any adjournment thereof.[10] A penalty is attached to anyone who makes or executes, or votes or attempts to vote, under or by means of a proxy which is not duly stamped, and any vote so given is void.[10] Proxies executed abroad can be stamped with a penny stamp within thirty days after arrival in this country.[11] Provided, however, a proxy is duly stamped on execution, the date of execution and the date of the meeting at which it is to be used may be filled in afterwards by anyone having authority to do so.[1] Where a proxy confers authority to vote at more than one meeting or to vote generally it requires a 10s. stamp.[2]

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[1] *In re Teede and Bishop*, 1901, 70 L.J. (Ch.) 409; *Thomson* v. *Henderson's Transvaal Estates*, [1908] 1 Ch. 765.

[2] *Ernest* v. *Loma Gold Mines*, [1897] 1 Ch. 1.

[3] Cp. Table A, Clause 64 *sqq.*

[4] *Harben* v. *Phillips*, 1883, 23 Ch. D. 14.

[5] *Bombay-Burmah Trading Corporation* v. *Dorabji Cursetji Shroff*, [1905] A.C. 213.

[6] *Harben* v. *Phillips*, *supra.*

[7] *Colonial Gold Reefs* v. *Free State Rand*, [1914] 1 Ch. 382.

[8] *Sadgrove* v. *Bryden*, [1907] 1 Ch. 318; *Ex parte Lancaster*, 1877, 5 Ch. D. 911.

[9] *Peel* v. *London and North-Western Rly. Co.*, [1907] 1 Ch. 5.

[10] Stamp Act, 1891, s. 80.

[11] Finance Act, 1907, s. 7.

SECTION 6.—LIQUIDATOR.

SUBSECTION (1).—*Appointment.*

685. In a voluntary winding up the company appoints one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company, and fixes the remuneration to be paid to him or them.[3] It is not necessary to give notice of an intention to appoint a liquidator, for that is a necessary consequence of the winding up.[4] Where a winding up is resolved on by special resolution, a liquidator cannot be appointed at the first meeting,[5] and if at that meeting a resolution purporting to make such an appointment is passed it will require to be confirmed at the second meeting,[6] at which a different liquidator may be appointed even without notice.[7]

686. Within twenty-one days of his appointment the liquidator must file with the Registrar of Companies a notice of his appointment.[8] Within seven days of his appointment he must send notice by post to all persons who appear to him to be creditors of the company, that a meeting of creditors will be held on a date not less than fourteen, nor more than twenty-one days after his appointment, and at a place and hour to be specified in the notice, and must advertise notice of the meeting once in the *Gazette* and once at least in two local newspapers.[9] At the meeting the creditors determine whether an application should be made to the Court for the appointment of a liquidator in place of, or jointly with, the liquidator appointed by the company, or for the appointment of a committee of inspection.[10] On such application the Court may make an order for the removal of the liquidator appointed by the company and the appointment of another liquidator, or for the appointment of a liquidator to act jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection. In making the order the Court has regard to the interest of the creditors and contributories, and may make such order as to the costs of the application as it thinks fit.[11]

687. If a vacancy occurs in the office of liquidator, by death, resignation, or otherwise, the company in general meeting may, subject to any arrangement with its creditors, fill the vacancy.[12] For that purpose a general meeting may be convened by any contributory, or if there were more liquidators than one, by the continuing liquidator.[13] The meeting must be held in manner prescribed by the articles, or in such manner as may, on application by any contributory or by the continuing liquidators, be determined by the Court.[1] If from any cause there is no liquidator acting, the Court may, on the application of a contributory, appoint a liquidator,[2] and may, on cause shewn, remove a liquidator and appoint another.[3] Under this section the Court may appoint an additional liquidator.[4]

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[1] *Sadgrove* v. *Bryden*, [1907] 1 Ch. 318; *Ernest* v. *Loma Gold Mines*, [1897] 1 Ch. 1.

[2] Stamp Act, 1891, s. 80.

[3] Sec. 186 (ii).

[4] *In re Welsh Flannel and Tweed Co.*, 1875, L.R. 20 Eq. 360; *Oakes* v. *Turquand*, 1867, L.R. 2 H.L. 325, at p. 355.

[5] *In re Indian Zoedone Co.*, 1884, 26 Ch. D. 70.

[6] *In re London and Australian Agency Corporation*, 1873, 29 L.T. 417.

[7] *In re Trench Tubeless Tyre Co.*, [1900] 1 Ch. 408.

[8] Sec. 187 (1).

[9] Sec. 188 (1).

[10] Sec. 188 (2).

[11] Sec. 188 (3) and (5).

[12] Sec. 189 (1).

[13] Sec. 189 (2).

SUBSECTION (2).—*Powers and Duties.*

688. The liquidator exercises all the powers given to a liquidator in a winding up by the Court, including the power to settle the list of contributories and make calls.[5] In the case of powers exercised under s. 214, the sanction of an extraordinary resolution of the company is required. But such a resolution is only necessary for the protection of the liquidator and of the company against him, and accordingly a creditor cannot attack a compromise on the ground that it has not been sanctioned by such a resolution.[6] Where there is more than one liquidator and some exercise of discretion is involved, it must be exercised by all the liquidators and cannot be entrusted to one.[7]

689. It is the duty of the liquidator to pay the debts of the company and adjust the rights of the contributories among themselves.[8] Apart from special arrangements under s. 192, it is the duty of the liquidator to sell the assets for cash.[9]

SECTION 7.—EFFECTS OF WINDING UP ON BUSINESS OF COMPANY.

690. From the commencement of the winding up the company ceases to carry on its business, except so far as may be required for the beneficial winding up thereof. The corporate state and corporate powers of the company, however, continue until it is dissolved.[10] Whether a winding up discharges the servants of the company depends on the facts in each case.[11] *Prima facie* a winding up does not terminate ordinary trading contracts made prior thereto.[12] On the appointment of a liquidator all the powers of the directors cease, except in so far as the company in general meeting or the liquidator sanctions the continuance thereof.[13]

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[1] Sec. 189 (3). [2] Sec. 186 (8). [3] Sec. 186 (9).

[4] *In re Sunlight Incandescent Gas Lamp Co.,* [1900] 2 Ch. 728.

[5] Sec. 186 (v).

[6] *Cyclemakers Co-operative Supply Co.* v. *Sims,* [1903] 1 K.B. 477.

[7] *Re Metropolitan Bank and Jones,* 1876, 2 Ch. D. 366; *Ex parte Agra and Masterman's Bank,* 1871, L.R. 6 Ch. 206.

[8] Sec. 186 (v).

[9] *Bisgood* v. *Henderson's Transvaal Estates,* [1908] 1 Ch. 743. [10] Sec. 184.

[11] *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*), [1918] 1 K.B. 592; *Shireff's case,* 1872, L.R. 14 Eq. 417.

[12] *Tolhurst* v. *Associated Portland Cement Manufacturers,* [1903] A.C. 414; *British Waggon Co.* v. *Lea,* 1880, 5 Q.B.D. 149.

[13] Sec. 186 (iii).

SECTION 8.—APPLICATION OF PROPERTY.

691. The property of the company must be applied in satisfaction of its liabilities *pari passu*, and subject thereto must, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company.[1] All costs, charges, and expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the assets of the company in priority to all other claims.[2] As in a compulsory liquidation, debts incurred by the liquidator have priority.[3] So also with expenses incurred by the liquidator in litigation.[4]

SECTION 9.—ARRANGEMENTS WITH CREDITORS.

692. Any arrangement entered into between a company about to be, or in the course of being, wound up voluntarily and its creditors is (subject to a right of appeal to the Court) binding on the company if sanctioned by an extraordinary resolution, and on the creditors if acceded to by three-fourths in number and value of the creditors.[5]

SECTION 10.—SETTLEMENT OF LIST OF CONTRIBUTORIES.

693. The liquidator settles the list of contributories and makes calls, and the list is *prima facie* evidence of the liability of the persons named therein to be contributories.[6] Every transfer of shares, except transfers made to or with the sanction of the liquidator, made after the commencement of the winding up is void. Where such a transfer is sanctioned, the transferor or, in the case of several transfers, the transferors are all put on the B list of contributories.[7] The Court has power to rectify the register, but not to the effect of freeing from liability a party to a voidable contract which has not been repudiated before the winding up,[8] even in a case where the assets are sufficient to meet all the liabilities.[9]

SECTION 11.—RECONSTRUCTION.

694. Where a company is proposed to be, or is in the course of being, wound up voluntarily, and the whole or part of its business or property is proposed to be transferred or sold to another company, the liquidator of the transferor company may, with the sanction of a special resolution of that company, receive in compensation or part compensation for the transfer or sale, shares, policies, or other like interests in the transferee company for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the transferee company. Any such sale or arrangement is binding on the members of the transferor company.

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[1] Sec. 186 (i).

[2] Sec. 196.

[3] *In re National Arms and Ammunition Co.*, 1885, 28 Ch. D. 474.

[4] *Ex parte Smith*, 1867, L.R. 3 Ch. 125; *In re London Metallurgical Co.*, [1895] 1 Ch. 758.

[5] Sec. 191 (i).

[6] Sec. 186 (v) and (vi).

[7] *Taylor's, Phillip's*, and *Richard's* cases, [1897] 1 Ch. 298.

[8] *Stone* v. *City and County Bank*, 1877, 3 C.P.D. 282.

[9] *Burgess's* case, 1880, 15 Ch. D. 507.

695. If any member of the transferor company, who did not vote in favour of the special resolution at either of the meetings held for passing and confirming the same, expresses his dissent therefrom in writing, addressed to the liquidator and left at the registered office of the company within seven days after the confirmation of the resolution, he may require the liquidator either to abstain from carrying the resolution into effect or to purchase his interest at a price to be determined by agreement or by arbitration in manner provided by the section. If the liquidator elects to purchase the member's interest, the purchase-money must be paid before the company is dissolved and be raised by the liquidator in such manner as may be determined by special resolution. A special resolution will not be invalid for the purposes of the section by reason that it is passed before or concurrently with a resolution for winding up the company or for appointing liquidators, but if an order is made within a year for winding up the company by or subject to the supervision of the Court, the special resolution will not be valid unless sanctioned by the Court.

696. A reconstruction agreement which is not made under the section is not binding on the members of the transferor company unless they all assent to it,[1] but in some cases such assent may be inferred from the acquiescence of the members.[2] The section does not alter the rights of members, and where in the transferor company there are both ordinary shares and preference shares, which have no priority in return of capital, the shares in the transferee company all rank *pari passu*.[3]

697. The section enables the liquidator, instead of converting the assets into money, to exchange them for shares or like interest for the purpose of distribution amongst the members, but it safeguards the dissentient member by providing for the purchase of his interest at a price to be determined as mentioned in the Act. The dissentient member being thus in a position by taking proper steps to obtain the value of his interest in the company, there is no hardship upon him in any of the following arrangements within reasonable limits: (1) That the shares for distribution be partly paid shares, or (2) that if he wants the shares he must apply for them within a reasonable time, or (3) that shares unapplied for are to be at the disposal of the new company, or (4) that shares unapplied for may be sold and the member who does not assent shall take the proceeds (for this is giving him something more than that to which he would be otherwise entitled), or (5) that the shares shall not go to the company and be assets of the company but shall go direct to the members.[1] But a company may not, by the insertion of clauses in its memorandum, evade the operation of the section so as to defeat the rights conferred by it on dissentients.[1] If there are dissenting members unpaid, the company may be put under an undertaking not to part with the assets until provision is made for them.[2]

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[1] *Bisgood* v. *Henderson's Transvaal Estates*, [1908] 1 Ch. 743.

[2] *In re Beeston Pneumatic Tyre Co.*, 1898, 14 T.L.R. 338.

[3] *Simpson* v. *Palace Theatre*, 1893, 69 L.T. 70.

698. A dissentient must not only give notice of his dissent in writing within seven days, but must also within the period require the liquidator in writing either to abstain from the agreement or to purchase his interest.[3] Where a notice merely requires the liquidator to purchase the dissentient's interest and does not give the liquidator the option of abstaining from the agreement it is invalid.[4] Creditors or contributories who are prejudiced by a reconstruction have a remedy in presenting a petition for a winding-up order by the Court or subject to its supervision, but in such a petition a contributory, at least, will have to shew that the scheme is unfair and oppressive to the minority of the members.[5]

699. A resolution for winding up is not invalid by reason of its being passed contemporaneously and in concert with resolutions for a reconstruction scheme which are held to be invalid. The status of the company has been altered by that resolution and cannot be altered back by the fact that other resolutions have been joined with it. It is otherwise when the winding-up resolution has been passed on the footing that there is going to be a reconstruction which fails.[6]

Section 12.—Compulsory Winding Up after Voluntary Winding Up has Commenced.

700. The voluntary winding up of a company does not bar the right of any creditor or contributory to have it wound up by the Court if the Court is of opinion, in the case of an application by a creditor, that the rights of the creditors or, in the case of an application by a contributory, that the rights of the contributories will be prejudiced by a voluntary winding up.[7] Where before the presentation of a petition for the winding up of a company by the Court a resolution has been passed for voluntary winding up, the winding up is deemed to have commenced at the time of the passing of the resolution, and unless the Court on proof of fraud or mistake thinks fit otherwise to direct, all proceedings taken in the voluntary winding up are deemed to be validly taken.[8] In any other case the winding up of a company by the Court is deemed to commence at the time of the presentation of the petition.[9]

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[1] *Bisgood* v. *Henderson's Transvaal Estates*, [1908] 1 Ch. 743.

[2] *In re Hester & Co.*, 1875, 44 L.J. (Ch.) 757.

[3] *In re Union Bank of Kingston-upon-Hull*, 1880, 13 Ch. D. 808.

[4] *In re Demerara Rubber Co.*, [1913] 1 Ch. 331.

[5] *In re Consolidated South Rand Mines Deep*, [1909] 1 Ch. 491.

[6] *Thomson* v. *Henderson's Transvaal Estates*, [1908] 1 Ch. 765.

[7] Sec. 197. [8] 1929 Act, s. 175 (1). [9] *Ibid.*, s. 175 (2).

701. The common case for the intervention of the Court is where there are grounds for investigation involving a public examination,[1] *e.g.* where the business has been carried on in a manner that was shocking both from a commercial and moral point of view.[2] But a public examination is not appropriate merely on the ground that fraud has been committed on the public, where the charges are not connected in any way with the promotion or formation of the company.[3] The Court may also intervene where the liquidator is for some reason undesirable,[3] or where the voluntary winding up is attended by suspicious circumstances.[4]

702. The Court will make the order if it is desired by the majority of the creditors, even though the petitioner himself cannot prove prejudice.[5] But where the majority of creditors are opposed to the application it will not be granted [6] unless it is shewn that the opposing creditors are persons incriminated and not acting in the interests of the creditors as a whole.[7] In the case of a creditors' petition, little regard is paid to the views of contributories unless it is plain that there will be surplus assets for division amongst them.[8] On the other hand, where a contributory is petitioner, the opposition of the majority of creditors is likely to be a fatal obstacle unless it is reasonably clear that the creditors will be paid in full.

SECTION 13.—NEW PROVISIONS OF THE COMPANIES ACT, 1929.

SUBSECTION (1).—*Members' Voluntary Winding Up.*

703. The Companies Act, 1929, introduces a new procedure with regard to a voluntary winding up. Where it is proposed to wind up a company voluntarily, the directors of the company may, at a meeting of the directors held before the date on which the notices of the meeting at which the resolution for the winding up of the company is to be proposed are sent out, make a statutory declaration to the effect that they have made a full inquiry into the affairs of the company and that having so done they have formed the opinion that the company will be able to pay its debts in full within a period not exceeding twelve months from the commencement of the winding up.[9] A declaration has no effect unless delivered to the Registrar of Companies for registration before the said date.[10] A winding up where such a declaration has been made and delivered is termed "a members' voluntary winding up," and a winding up where no such declaration is made is termed a "creditors' voluntary winding up." In the case of a members' voluntary winding up the procedure follows the lines of the old practice.[11]

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[1] *In re Varieties, Ltd.*, [1893] 2 Ch. 235; *In re Medical Battery Co.*, [1894] 1 Ch. 444.

[2] *In re Peruvian Amazon Co.*, 1913, 29 T.L.R. 384.

[3] *In re Medical Battery Co.*, *supra.*

[4] *In re Haycraft Gold Reduction and Mining Co.*, [1900] 2 Ch. 230.

[5] *In re Bishop & Sons*, [1900] 2 Ch. 254; *In re Hermann Lichtenstein & Co.*, 1907, 23 T.L.R. 424.

[6] *In re West Hartlepool Ironworks Co.*, 1875, L.R. 10 Ch. 618; *In re Langley Mills Steel and Ironworks Co.*, 1871, L.R. 12 Eq. 26.

[7] *In re Varieties, Ltd.*, *supra.*

[8] *In re Chillington Iron Co.*, 1885, 29 Ch. D. 159.

[9] Sec. 230 (1).

[10] Sec. 230 (2).

[11] Secs. 231–236.

SUBSECTION (2).—*Creditors' Voluntary Winding Up.*

(i) *Meeting of Creditors.*

704. In the case of a creditors' voluntary winding up the company must cause a meeting of the creditors of the company to be summoned for the day or the day next following the day on which there is to be held the meeting at which the resolution for voluntary winding up is to be proposed, and must cause the notices of the meeting of creditors to be sent by post to the creditors simultaneously with the sending of the notices of the meeting of the company. The company must cause notice of the meeting of the creditors to be advertised once in the *Gazette* and once at least in two local newspapers. The directors must cause a full statement of the position of the company's affairs, together with a list of its creditors and the estimated amount of their claims, to be laid before the meeting of creditors. They must also appoint one of their number to preside at that meeting, and it is his duty to attend the meeting and preside thereat.[1]

(ii) *Appointment of Liquidator.*

705. The creditors and the company at their respective meetings may nominate a person to be liquidator for the purpose of winding up the affairs and distributing the assets of the company, and if the creditors and the company nominate different persons the person nominated by the creditors must be liquidator, and if no person is nominated by the creditors the person, if any, nominated by the company must be liquidator. In the case of different persons being nominated, any director, member, or creditor of the company may, within seven days after the date on which the nomination was made by the creditors, apply to the Court for an order either directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors or appointing some other person to be liquidator instead of the person appointed by the creditors.[2]

(iii) *Committee of Inspection.*

706. The creditors may, if they think fit, appoint a committee of inspection consisting of not more than five persons, and if such a committee is appointed the company may, either at the meeting at which the resolution for voluntary winding up is passed, or at any time subsequently, in general meeting appoint such number of persons as they think fit to act as members of the committee, not exceeding five in number. The creditors may, if they think fit, resolve that all or any of the persons so appointed by the company ought not to be members of the committee of inspection, and if the creditors so resolve, the persons mentioned in the resolution shall not, unless the Court otherwise directs, be qualified to act as members of the committee, and on any application to the Court under this provision the Court may, if it thinks fit, appoint other persons to act as such members in place of the persons mentioned in the resolution.[1]

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[1] Sec. 238.

[2] Sec. 249.

707. The committee of inspection or, if there is no such committee, the creditors may fix the remuneration of the liquidator.[2] On the appointment of a liquidator all the powers of the directors cease, except so far as the committee of inspection or, if there is no such committee, the creditors sanction the continuance thereof.[3] If a vacancy occurs by death, resignation, or otherwise in the office of a liquidator, other than a liquidator appointed by, or by the direction of, the Court, the creditors may fill the vacancy.[4]

(iv) *Powers of Liquidator.*

708. The liquidator in every voluntary winding up may without sanction exercise any of the powers given to the liquidator in a winding up by the Court except the power to pay any classes of creditors in full, the power to make any compromise or arrangement with creditors, and the power to compromise all calls and liabilities to calls, etc. These powers can only be exercised in the case of a members' voluntary winding up with the sanction of an extraordinary resolution of the company, and, in the case of a creditors' voluntary winding up, with the sanction of either the Court or the committee of inspection.[5]

(v) *Stay of Proceedings.*

709. If the Court on the application of the liquidator so directs, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose.[6]

Section 14.—Winding Up Subject to Supervision.

710. Where a company has by special or extraordinary resolution resolved to wind up voluntarily the Court may make an order that the voluntary winding up shall continue, but subject to such supervision of the Court and with such liberty for creditors, contributories, or others, to apply to the Court and generally on such terms and conditions as the Court thinks just.[7] The main advantage of a supervision order is that it automatically stops all actions and diligence against the company.[8]

711. Where an order is made for a winding up subject to supervision the Court may by the same or any subsequent order appoint an additional liquidator, who shall have the same powers, be subject to the same obligations, and in all respects stand in the same position as if he had been appointed by the company. The Court may also remove any liquidator and fill any vacancy caused by the removal or by death or resignation.[1] In a winding up subject to supervision the liquidator may, subject to any restrictions imposed by the Court, exercise all his powers without the sanction of the Court in the same manner as if the company was being wound up altogether voluntarily.[2]

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[1] Sec. 240.
[2] Sec. 241 (1).
[3] Sec. 241 (2).
[4] Sec. 242.
[5] Sec. 247.
[6] Sec. 253 (1).
[7] Sec. 199.
[8] Secs. 203 and 213.

SECTION 15.—DISSOLUTION OF COMPANY.

712. In the case of every voluntary winding up, as soon as the affairs of the company are fully wound up the liquidator must make an account of the winding up, shewing how the winding up has been conducted and the property of the company has been disposed of; and thereupon must call a general meeting of the company for the purpose of laying before it the account and giving any explanation thereof. The meeting must be called by advertisement in the *Gazette*, specifying the time, place, and object thereof, and published one month at least before the meeting.

713. Within one week after the meeting the liquidator must, under penalty for failure, make a return to the Registrar of Companies of the holding of the meeting and of its date. The registrar on receiving the return must forthwith register it, and on the expiration of three months from the registration of the return the company shall be deemed to be dissolved. The Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.[3] As in the case of a winding up by the Court, the dissolution may be declared void within two years of its date.[4]

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[1] Sec. 202.
[2] Sec. 203.
[3] Sec. 195.
[4] Sec. 223.

LIQUOR LICENCES.

See EXCISE; LICENSING LAWS.

LIS ALIBI PENDENS.

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SECTION 1.—NATURE OF PLEA.

714. There is always an equitable power and duty of control in each tribunal to see that there is not on the whole an improper or oppressive accumulation of litigation or diligence.[1] Accordingly if the question raised in an action is already at issue in a prior suit depending before another Court of competent jurisdiction, the second action may be sisted or dismissed on the plea of *lis alibi pendens.* The plea must be stated *in limine* and may be waived by implication, *e.g.* by minute prorogating the jurisdiction.[2]

SECTION 2.—IDENTITY OF GROUND OF ACTION.

715. To found the plea the earlier action must be regular, and must truly raise the same question as that sought to be litigated in the second action.[3] Thus a wife may sue an action of divorce and one of separation and aliment simultaneously on the same grounds.[4] The dependence of a multiplepoinding for the distribution of a trust fund and exoneration of the trustee was held not to entitle him to object on the ground of *lis alibi* to an ordinary petitory action at the instance of a legatee, directed against him as trustee and also as an individual.[2] But a creditor who raises an ordinary action upon a bill cannot at the same time proceed by summary diligence upon it.[5] The plea does not apply to counter declarators, on the ground that the defender of the first action is not bound to await the pleasure of the pursuer in proceeding with it.[6] Where two cases raising precisely the same question were called on the same day before different Lords Ordinary, the one first served was held to have the preference, and the other was dismissed on the plea of *lis alibi*.[1]

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[1] *Cochrane* v. *Paul*, 1857, 20 D. 178, per Lord Neaves at p. 179 ; see *Seton* v. *Hawkins*, 1842, 5 D. 396.

[2] *Longmuir* v. *Longmuir*, 1850, 12 D. 926.

[3] *Mags. of Kilrenny* v. *Johnstone*, 1828, 6 S. 624 ; *Butchard* v. *Walker & West*, 1828, 7 S. 203 ; *Wilson* v. *Junor* (O.H.), 1907, 15 S.L.T. 182 ; *Wilson* v. *Dunlop, Bremner & Co.* (O.H), 1921, 1 S.L.T. 35.

[4] *Stewart* v. *Stewart*, 1906, 8 F. 679.

[5] *Denovan* v. *Cairns*, 1845, 7 D. 328 ; but see *Keltie* v. *Wilson*, 1827, 6 S. 258.

[6] *Howden* v. *Viscountess Hawarden*, 1864, 2 M. 637 ; *Wishart* v. *Howatson*, 1897, 5 S.L.T. 115 ; *Harland Engineering Co.* v. *Stark's Tr.*, 1913, 2 S.L.T. 448.

SECTION 3.—IDENTITY OF PARTIES.

716. The *lis alibi* must be between the same parties or parties representing the same interest. A supplementary summons for the purpose of calling new defenders was held not to raise the plea.[2]

SECTION 4.—PRIOR ACTION MUST BE IN DEPENDENCE.

717. To found the plea the prior suit must be in dependence. An action begins to depend as soon as the summons is executed, although not called,[3] and it does not cease to depend until the final decree for taxed expenses is pronounced,[4] except where the prior *lis* has been dismissed on a plea of no jurisdiction.[5] It does not cease to depend because it has fallen asleep.[6] To obviate the plea the first action should be abandoned before the second one is brought, or at all events before the plea falls to be disposed of.[7] Abandonment should be formal, but it is sufficient that it is intimated in the summons,[8] or the condescendence [7] of the second action, and even a letter intimating abandonment has been held sufficient where the first summons had been served but not called,[8] or where the action had been asleep for several years.[9]

SECTION 5.—DEPENDENCE MUST BE IN COMPETENT COURT.

718. The *lis alibi* must be in a competent Court.[10] When the earlier action is in an inferior Court the plea will not be obviated by bringing it to the Court of Session on an appeal *ob contingentiam*.[11] The plea will not exclude an action when the *lis alibi* is in a foreign Court,[12] but in such a case the Court will, if the equities appear to make it desirable, exercise its power of control to see that there is not an improper accumulation of litigation or diligence.[13] England and Ireland were formerly regarded as foreign countries for this purpose,[14] but it is thought that since the Judgment Extension Acts [15] the dependence of a suit in any Court of the United Kingdom will exclude action in Scotland upon the same grounds.

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[1] *Lowe's Trs.* v. *Lowe*, 1893, 1 S.L.T. 25.

[2] *Thomson's Trs.* v. *Livingstone*, 1863, 2 M. 114.

[3] *Aitken* v. *Dick*, 1863, 1 M. 1038; *Kennedy* v. *Macdonald*, 1876, 3 R. 813.

[4] *Allan* v. *Wormser, Harris & Co.*, 1894, 21 R. 866; *Porteous* v. *Caledonian Rly. Co.*, 1891, 29 S.L.R. 21.

[5] *Watt* v. *Coghlan*, 1902, 10 S.L.T. 89.

[6] *Denovan* v. *Cairns*, 1845, 7 D. 328.

[7] *M'Aulay* v. *Cowe*, 1873, 1 R. 307.

[8] *Laidlaw* v. *Smith*, 1834, 12 S. 578.

[9] *Grant* v. *Kerr*, 1846, 19 Sc. Jur. 60.

[10] *Mags. of Arbroath* v. *Presbytery of Arbroath*, 1883, 10 R. 767; *Nivison* v. *Howat*, 1883, 11 R. 182; see *Watt* v. *Coghlan*, *supra*.

[11] *Greig* v. *Johnstone*, 1835, 13 S. 635.

[12] *Inverarity* v. *Gilmore*, 1840, 2 D. 813.

[13] *Cochrane* v. *Paul*, 1857, 20 D. 178.

[14] *Ranken* v. *Stewart*, 1840, 2 D. 717; but see *Ferguson* v. *Buchanan*, 1890, 18 R. 119; *Macmaster* v. *Stewart*, 1834, 12 S. 731.

[15] 31 & 32 Vict. c. 54; 45 & 46 Vict. c. 31.

LITIGIOSITY.

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SECTION 1.—DEFINITION AND EFFECT.

719. Litigiosity has been defined as an implied prohibition of alienation to the disappointment of an action or of diligence, the direct object of which is to attain the possession or acquire the property of a particular subject.[1] The effect of it is that when such action or diligence has been begun, and the necessary steps are taken to ensure publication, a purchaser is compelled to take the estate as it stands in the person of the seller, and is bound by the decree to be pronounced in the action or subject to the diligence then in dependence. The defender or debtor cannot by any alienation after litigiosity has commenced evade the consequences of the action or diligence which has been instituted against him, although litigiosity is not always necessary to bring about the same result.[2] The doctrine is embodied in the maxim *pendente lite nihil innovandum.* Litigiosity when completed strikes only against voluntary deeds, and does not affect such as are granted in fulfilment of prior obligations.

SECTION 2.—HOW CONSTITUTED.

720. Litigiosity in real actions for recovering the property or possession of lands did not require, according to our older practice, any registration in order to constitute it effectually. It arose as soon as the action or diligence had proceeded "so far as to be open to public observation." [3] The point of time at which the land became litigious was not precisely defined: the mere citation of the debtor was not in itself sufficient: [4] but it was generally assumed that it arose as soon as the action was called in Court.[5] Statutory provision was made by the Titles to Land Consolidation (Scotland) Act, 1868,[6] for the registration in the General

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[1] Bell, Com. ii. 144.

[2] *Marshall* v. *Callander and Trossachs Hydropathic Co.*, 1895, 22 R. 954; 1896, 23 R. (H.L.) 55.

[3] Bell, Com. ii. 144.

[4] *Morison & Co.* v. *Allardes*, 1787, Mor. 8335.

[5] For an exposition of the old law see Stair, iii. 1, 18; Bankt. iii. 41; Ersk. ii. 11, 7; ii. 12, 16, 41, 65; iii. 6, 11; Bell, Com. ii. 144, 185; Shand, Practice, pp. 276, 604, 692; Kames, Elucidations, p. 121; Equity, pp. 307, 395.

[6] 31 & 32 Vict. c. 101.

Register of Inhibitions of notices of summonses of reduction of any conveyance or deed of or relating to lands, and in the Register of Adjudications of notices of summonses of adjudication or of constitution and adjudication, and it was provided that no such summonses should render litigious the lands to which they related except from and after the date of registration of the notice. Provision was also made for notices of inhibition, whether in a summons or in letters of inhibition, being registered in the General Register of Inhibitions. The Register of Adjudications and the General Register of Inhibitions have now been combined, and the existing law with regard to notices of litigiosity is now contained in s. 44 of the Conveyancing (Scotland) Act, 1924.[1]

721. In terms of that section it is enacted that no action, whether raised before or after the commencement of the Act relative to land or to a lease or to a heritable security, shall be deemed to have had or shall have the effect of making such land, lease, or heritable security litigious, unless and until a notice in the form of Schedule RR annexed to the 1868 Act shall have been or shall be registered in the Register of Inhibitions and Adjudications,[2] so that no decree in any action of adjudication of land or of a heritable security, whether pronounced before or after the commencement of the Act, and no abbreviate of any such decree, shall be deemed to have had or to have any effect in making such land, lease, or heritable security litigious.[3]

SECTION 3.—PRESCRIPTION OF NOTICES OF LITIGIOSITY.

722. The same section of the Conveyancing (Scotland) Act, 1924, provides that all notices of litigiosity subsisting at the commencement of the Act shall prescribe and be of no effect on the lapse of five years after such commencement or at such earlier date as they would prescribe according to the present law and practice, and that notices of litigiosity registered after the commencement of the Act shall prescribe on the lapse of five years from the date when they take effect. It is also provided that in no case shall litigiosity be pleadable or be founded on to any effect after the expiry of six months from final decree in the action creating such litigiosity.[4]

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[1] 14 & 15 Geo. V. c. 27.

[2] Sec. 44 (2) (*a*).

[3] Sec. 44 (2) (*b*).

[4] Sec. 44 (3) (*a*).

LITISCONTESTATION.

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SECTION 1.—LITIS CONTESTATIO IN ROMAN LAW.

SUBSECTION (1).—*Definition.*

723. *Litis contestatio* in Roman law denoted the point of time in the development of an action at which the issue to be tried was definitely determined. It was the practice under the ancient system of *legis actiones* for both parties at the close of the preliminary formal proceedings to address a solemn appeal to witnesses (*contestari*) to take note that the preliminary formalities had been complied with, so that if any dispute subsequently arose as to their valid performance evidence might be forthcoming.[1] Under the formulary system the term was retained to mark the point at which an action passed from *prætor* to *judex*. The proceedings *in jure* ended in the drawing up of a *formula*, and the delivery of this to the *judex* constituted the moment of *litis contestatio*.[2] During the latest period of the law, when the prætor or other judicial functionary no longer delegated the cause to a *judex* but heard and determined it himself, *litis contestatio* denoted the summary statements of the case and of the defence made before the judge by the pursuer and the defender. *Litis contestatio* is the moment at which the judge begins to hear the narrative of the cause of action.[3]

SUBSECTION (2).—*Effects.*

724. Certain important effects followed upon *litis contestatio*. In the classical law it operated novation, extinguishing the old and creating a new obligation. The legal relation of the parties underwent a formal transformation, a new quasi-contractual relation taking the place of the previous relation. The right of action was extinguished either *ipso jure* or *ope exceptionis* by means of the *exceptio rei in judicium*

GENERAL AUTHORITIES.—Stair, iv. 39; Ersk. iv. 1, 69–70; Shand, Practice, ii. 542; Mackay, Manual, p. 228; Maclaren, Practice, p. 403.

[1] Ulpian, Reg. No. 9; Dig. xxviii. 1, 20.

[2] Gaius, iii. 180; iv. 114.

[3] Cod. iii. 9, 1.

deductæ.[1] Any subsequent action was barred by the maxim *De eadem re ne bis sit actio.*[2] Under Justinian *litis contestatio* lost half of its former effect; for, while it retained the function of setting up a new obligation, it ceased to operate the extinction of the former obligation. *Litis contestatio* further had the effect of interrupting the running of prescription, and of rendering transmissible a right of action formerly not transmissible. Penal actions, for example, did not transmit against the heir of the defender until *litis contestatio*, after which they were capable of such transmission. Again, *litis contestatio* had the effect of converting the subject of litigation into a *res litigiosa* and thereby rendering its alienation by the pursuer or defender unlawful.

SECTION 2.—LITISCONTESTATION IN SCOTS LAW.

725. In Scots law litiscontestation denotes the point in the process where the parties join issue in the cause, and consent to abide by its event.[3] By the earlier practice it was constituted by granting a warrant, which was called an act of litiscontestation, for the proof of such facts as the judge determined to be relevant.[4] Later the practice grew up of granting a proof before ascertaining the relevancy. Litiscontestation is now constituted by lodging defences.[5] Before this stage a party, though he has appeared by counsel, may withdraw and allow decree in absence to pass.[6] After this stage the defender cannot simply pass from his appearance in the cause, and every decree pronounced therein is a decree *in foro.*[7]

726. Litiscontestation has various other effects arising from the judicial contract implied in it. Thus an action which is penal and which consequently would, in the ordinary case, fall by the death of the defender becomes, after litiscontestation, transmissible against heirs.[8] A claim for reparation founded on delict or quasi-delict transmits against representatives of the wrongdoer irrespective of litiscontestation.[9]

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[1] Gaius, iv. 106.

[2] Quint. vii. 6, 1.

[3] Mackay, Manual, p. 228.

[4] Mackay, Practice of the Court of Session, ii. 16.

[5] Act 1672, c. 16, s. 19.

[6] *Macturk* v. *Greig*, 1830, 8 S. 995.

[7] Act 1672, c. 16, s. 19; *Gow* v. *Henry*, 1899, 2 F. 48, per Lord Young at p. 52.

[8] Ersk. iv. 1, 70; *Stuart* v. *Bute*, 1712, Mor. 10351; *Graham* v. *Hopeton*, 1798, Mor. 5599; *Macturk* v. *Greig, supra*; *Gibson* v. *Barbour's Reps.*, 1846, 8 D. 427; *Evans* v. *Stool*, 1885, 12 R. 1295.

[9] *M'Naughton* v. *Robertson*, 17th February 1809, F.C.; *Morrison* v. *Cameron*, 25th May 1809, F.C.; *Davidson* v. *Tulloch*, 1860, 3 Macq. 783, per L.C. at p. 796; *Evans* v. *Stool*, *supra.*

LIVERY STABLE.

See INNKEEPER.

LOADING.

See CARRIAGE BY SEA; RAILWAYS AND CANALS.

LOAN.

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SECTION 1.—DEFINITION.

727. Loan may be defined as a real, or consensual-real contract, "by which the owner of a thing gives for the temporary accommodation of another the use of services derivable from it." [1] Writing is not essential to the constitution of the contract, which is completed by interchange of consent, followed by delivery of the thing lent. No question, therefore, of *locus pœnitentiæ* can arise in regard to loan, for there must always be *rei interventus*. "I confess I do not see how any question as to the statutory solemnities can arise under the contract of loan. . . . Having borrowed money, you cannot—money having passed—resile from your contract; or if you do resile you can only do so on the footing of restoring matters, which just means repayment of the money." [2] There are two sorts of loan, viz. commodate and *mutuum*, corresponding to a well-marked distinction in the nature of the thing lent.

SECTION 2.—COMMODATE.

SUBSECTION (1).—*Commodate Proper.*

728. Commodate is a contract by which "the use of anything is freely given to be restored the same without deterioration." [3] The property of an article thus lent (*e.g.* a horse or a picture) remains in the lender, upon whom consequently the loss falls in the event of its suffering deterioration or destruction, agreeably to the maxim, *res unaquœque perit suo domino*. There is an onus, however, upon the borrower, who is bound to restore the *ipsum corpus* of the loan, to prove that he exercised reasonable care in the use he made of the article.[4] If the borrower be at fault he must make up the loss;[1] but he will not be liable for an accident arising from causes over which he has no control.[2] If the loan be not gratuitous, the contract is not commodate, but location. There is a variety of commodate called *precarium*, where the use of the thing lent may be recalled at the lender's pleasure; but in commodate proper there is a term, either express or implied, at which the article must be restored, until which time the borrower is entitled to hold the subject. The lender is bound to refund to the borrower any extraordinary expenses incurred in preserving the subject lent. Commodate is dealt with by the institutional writers in the undernoted passages.[3]

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[1] Bell's Prin., s. 194.

[2] *Bryan* v. *Butters Bros. & Co.*, 1892, 19 R. 490, per Lord Kyllachy at p. 493.

[3] Stair, i. 11, 8.

[4] *Bain* v. *Strang*, 1888, 16 R. 186.

SUBSECTION (2).—*Precarium.*

729. In the contract of *precarium* the thing is lent gratuitously without specifying any time of redelivery and the contract is revocable at the lender's pleasure.[4] The borrower is only liable *de dolo et culpa lata.* Being entered into from a personal regard to the borrower it ceases by his death.

SECTION 3.—MUTUUM (PROPER).

730. *Mutuum* is a contract by which "one gives and transfers a fungible to another without hire, for use by consumption, on an engagement to restore as much of the same thing at the stipulated term."[5] "Fungibles" are those things (*e.g.* corn, wine, money) which cannot be used without extinction or alteration, and which can be estimated by weight, number, or measure. Hence the property passes to the borrower, upon whom the loss of the article, if loss takes place, falls, and whose obligation is satisfied if at the period agreed on he restores an amount and quality of the commodity equal to what he borrowed. The lender is subjected to no counter-obligation, and thus the only action which the contract produces "is pointed against the borrower, that he may restore as much in quantity and quality as he borrowed, together with the damage the lender may have suffered through default of due performance."[6] Fungibles alone are, as a rule, the subject of *mutuum*; but in one peculiar species of the contract, viz. Steelbow,[7] things not of their own nature fungible are held and dealt with as such.

SECTION 4.—MUTUUM—LOAN OF MONEY.

SUBSECTION (1).—*General.*

731. The commonest form of loan is that of money for a conventional rate of interest; and though such a contract is, strictly speaking, more properly "location of the use of the fungible" (for "we allow no profit *in mutuo*"),[1] it possesses otherwise the characteristics of *mutuum*, and is discussed by the institutional writers under that head. When money is the subject of the contract, the borrower is not bound to pay back its intrinsic value (though such was the old rule of Scots law),[2] but only the value stamped upon it by public authority.[3]

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[1] *Buchannan* v. *Bailie of Walston*, 1696, 1 Fount. 712.

[2] *Lady Colville* v. *Fleming*, 1693, 1 Fount. 712.

[3] More's Notes, lxxi; Ersk. iii. 1, 20, 25; Stair, i. 11, 10; Bell's Prin., ss. 195, 200.

[4] Ersk. iii. 1, 25; Bell's Prin., s. 195; Ersk. Prin. iii. 1, 9.

[5] Bell's Prin., s. 200.

[6] Ersk. Prin. iii. 1, 7.

[7] See LEASE, p. 57, *ante*.

SUBSECTION (2).—*Interest.*

732. At an early period of our jurisprudence there prevailed a general rule that interest,[4] if not expressly stipulated for, was not to be presumed to be due, but in later times, says Mr. Bell,[5] "the exceptions introduced have been so numerous that were a rule now to be laid down, it would be more correct, reversing the proposition of the ancient law, to say that interest is due in all cases where money is lent, or where the use of it is taken or retained; unless, from the circumstances of the case, there is ground in equity to hold that interest was not meant to be demanded"; and he adds, in his enumeration of the various contracts in which an obligation to pay interest is implied, that "the doctrine is gradually extending so as to recognise a claim of interest in all cases of loan and debt in which one enjoys the use of money belonging to another." The principle thus enunciated was given effect to in the undernoted case,[6] and has since been more than once affirmed. There thus arises out of the fact that money has been advanced in loan, not merely an obligation on the party who has borrowed instantly to repay the sum, but also "another obligation that so long as the sum remains unpaid the party shall pay legal interest. These are the obligations which result in law from the loan."[7]

733. The rate of interest due by implication on loans and other debts has hitherto been generally taken to be five per cent., being the highest rate of interest allowed by the Usury Laws, now repealed;[8] but there is no absolute or statutory rule on the subject, though the practice has been almost invariable; and "it may not be beyond the powers of the Court to reduce the rate usually awarded in case of a permanent fall in the rate of interest obtainable in this country."[9] The legislative swing of the pendulum from the Statute of 1853 may be observed in the Moneylenders' Acts of 1900[10] and 1927,[11] which contain rules for calculating interest due.

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[1] Stair, Inst. i. 11, 6.

[2] Act 1467, c. 19.

[3] Ersk. iii. 1, 8; 33 Vict. c. 10, s. 6.

[4] See INTEREST OF MONEY, Vol. VIII. p. 359, *ante*.

[5] Bell, Com. i. 692.

[6] *Garthland's Trs.* v. *M'Dowall*, 26th May 1820, F.C.

[7] *Thomson* v. *Geekie*, 1861, 23 D. 693, per Lord Justice-Clerk Inglis at p. 701; *Cunningham* v. *Boswell*, 1868, 6 M. 890; *Forbes* v. *Forbes*, 1869, 8 M. 85.

[8] 17 & 18 Vict. c. 90. See MONEYLENDERS.

[9] *Ross* v. *Ross*, 1896, 23 R. 802, per Lord M'Laren at p. 806.

[10] 63 & 64 Vict. c. 51.

[11] 17 & 18 Geo. V. c. 21.

SECTION 5.—PROOF OF LOAN OF MONEY.

SUBSECTION (1).—*General.*

734. The great majority of questions which have come before the Court on the subject of loan have arisen in connection with the manner, not in which the contract may be constituted, which has been already dealt with, but in which the contract may be proved. Although, as has been said, writing is not necessary to the constitution of loan, it is a well-established rule that while many contracts of commodate, or even of *mutuum*, may be proved *prout de jure*, parole evidence is not sufficient, and therefore not admissible, to prove loan of money. Proof of the contract is therefore confined to the writ or oath of the alleged borrower.[1] This rule has never been seriously questioned; it is tacitly assumed in all the cases which turn on the proof of loan; it was declared by Lord President Inglis to be "a strict rule, and to be strictly and literally enforced";[2] and it was reaffirmed, though with manifest reluctance on the part of several of the judges, in a subsequent case.[3] An exception is indeed admitted in the case of loans not exceeding £100 Scots (£8, 6s. 8d.), in the proof of which parole evidence is competent.[4] But even in such cases there may be circumstances which infer that parole evidence is not admissible,[5] and where the sum sued for, though within the limit, is the balance of a larger sum, or where, though it embraces a number of items, each of which is within the limit, it exceeds that limit itself, the general principle applies.[6] Where, however, there is a going series of transactions between the parties, proof is not necessarily limited to writ or oath.[7]

SUBSECTION (2).—*Oath of Party.*

735. Proof by oath of party has been said to be "a reference and appeal to conscience peculiar to this country."[8] The crucial question for the Court to determine, when such reference has been made, is, *quid juratum est?* It is unnecessary here to refer to the decisions as to the import of party's oath, turning as they do upon the particular terms of the oath in each case. The general rules of interpretation are in no wise different as regards loan from what they are as regards other classes of cases in which proof is limited to the defender's oath on reference.[1]

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[1] Stair, iv. 2, 4; Ersk. iv. 2, 20; Bell's Prin., s. 2257; Dickson on Evidence, s. 562; *Tarbet* v. *Bennet*, 1803, Hume, 500; *Hamilton* v. *Richmond*, 1825, 1 W. & S. 35; *M'Master* v. *Brown*, 1829, 7 S. 337; *Birnie's Assignees* v. *Darroch*, 1824, 4 D. 336; *Welsh's Trs.* v. *Forbes*, 1885, 12 R. 851.

[2] *Haldane* v. *Speirs*, 1872, 10 M. 537, at p. 539.

[3] *Paterson* v. *Paterson*, 1897, 25 R. 144.

[4] *Hammermen of Glasgow* v. *Crawford*, 1628, Mor. 12408; *Thallane* v. *Orrock*, 1673, Mor. 12585; *Annand's Trs.* v. *Annand*, 1869, 7 M. 526.

[5] *Annand's Trs.* v. *Annand*, *supra.*

[6] *Clark* v. *Glen*, 1836, 14 S. 966; *Annand's Trs.* v. *Annand*, *supra.*

[7] *Smith's Trs.* v. *Smith*, 1911 S.C. 653; *Grant's Exrs.* v. *Grant*, 1922 S.L.T. 156.

[8] *Paterson* v. *Paterson*, 1897, 25 R. 144, per Lord Young.

SUBSECTION (3).—*Writ.*

736. Confining our attention, then, to the writ of the alleged borrower, we are confronted with the difficulty: Assuming that the subject-matter in dispute is not *in re mercatoria*, is it necessary that the writ of the borrower, relied upon by the pursuer as evidence of the contract of loan, should be either tested or holograph, in terms of the various statutes regulating the authentication of writs?[2] Or, will an improbative writing suffice? On this point there appears to be, at first sight at all events, a conflict of authority.

737. There is, perhaps, no decision or expression of opinion in favour of the stricter view so direct and unambiguous as Lord Deas' *dictum*:[3] "In order to prove a loan of money, a writing, not being a bill properly stamped, must, if not tested, be holograph of the borrower, and signed by him. The law admits of an exception *in re mercatoria*, but I know of no other." Several of the earlier cases, however, lend considerable countenance to the proposition. In *Stewart*[4] the writ was as follows: "I, Alexander Syme, vintner in Inver, acknowledge that I am due Charles Stewart £130 sterling, for which I will pay the said Charles Stewart on the 6th or 9th June 1813. (Signed) Alexander Syme. Dunkeld, April 6, 1813." The document was neither holograph nor tested. In an action raised by Stewart, the holder of the writ, against the representatives of Syme, the granter, Lord Pitmilly, Ordinary, found, *inter alia*, that the written document "is destitute of the legal solemnities, and not actionable," and the Court adhered. In *Alexander*[5] a claimant in a multiplepoinding, in order to instruct that a sum of money had been advanced by him to his son, founded on a document, neither holograph nor tested, but signed by the son, in which the latter acknowledged to have borrowed from his father the sum in question, "for which sum I oblige myself to pay interest." This document was rejected as evidence of the loan, being, in Lord Balgray's words, "just an improbative bond." In *Jones*[6] three co-obligants subscribed a document, which was holograph of one of them, acknowledging receipt of a sum of money, and undertaking to repay the same. In an action raised against one of the three, the defender pleaded that the document was neither holograph of him nor tested, and the Court assoilzied him on that ground, Lord President Hope remarking, "It may seem hard that a man's signature, when adhibited, should not be always obligatory, but the point is so fixed." Other cases may be cited in support of the same contention.[7]

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[1] See *Penney* v. *Aitken*, 1927 S.C. 673. See also OATH ON REFERENCE.

[2] Acts 1540, c. 117; 1579, c. 80; and 1681, c. 5.

[3] *Smith* v. *Smith*, 1869, 8 M. 239, at p. 241.

[4] *Stewart* v. *Syme*, 12th December 1815, F.C.

[5] *Alexander* v. *Alexander*, 1830, 8 S. 602.

[6] *Jones* v. *Farquharson*, 1835, 13 S. 838.

[7] *Hamilton's Exrs.* v. *Struthers*, 1858, 21 D. 51, per Lord Curriehill at p. 60; *Brodie* v. *Muirhead*, 1870, 8 M. 461; *Dunn's Trs.* v. *Hardy*, 1896, 23 R. 621.

738. In support of the opposite contention, that a writ founded upon *in modum probationis* need not be probative, it might be urged that in *Clark* v. *Ross* [1] a letter neither holograph nor tested was found obligatory because the subscription of the defender was acknowledged; that a similar result was arrived at in *Fraser* v. *Bruce*,[2] and that in *Haldane* v. *Speirs* [3] the sufficiency and not the competency of the writ produced in evidence was the *de quo quœritur*. The case, however, in which the point was most clearly decided is that of *Bryan*.[4] There the wife of the partner of a mercantile firm lent her husband, as for his firm, the sum of £100, in return for which she received the following acknowledgment: "Received from Mrs. J. W. F. Bryan, by the hands of Mr. J. W. F. Bryan, the sum of £100 on temporary loan, for which we are obliged. pp. Butters Bros., John Gibson." This document was in the handwriting of a clerk of the firm, and was signed by the firm's cashier. In an action by the wife against the firm for repayment of the loan, it appeared from a proof that the cashier had authority to grant the acknowledgment in question; and it was held that the loan was sufficiently instructed.

739. The question as to the admissibility of improbative writs as evidence of loan has now been authoritatively settled by a judgment of the whole Court (dissenting Lord Young and Lord Adam), and the decision in *Bryan* [4] has been in terms approved.[5] The facts in the case of *Paterson* [5] were as follows: A mother wrote to her son *A.*, requesting him to uplift and pay to another son, *B.*, the sum of £400 belonging to her. Upon the back of this letter *A.* took the following receipt, signed but not written, by *B.*: "Received the sum of £400 sterling, and I agree to assign a bond for same in favour of Mrs. Paterson [the lender] as arranged." There was also a letter from *B.* to the lender enclosing a draft for a sum of money composed of various items, including "interest for one year on the loan." After *B.'s* death the mother raised an action against his heir and his executrix for repayment of the loan, and produced the documents referred to. The grounds of judgment may be summarised as follows: A distinction must be drawn at the outset between writings which express obligations and writings which merely record facts. It is only to the former class that the authentication statutes apply. The scope of those statutes "is confined to those writings by which a person becomes directly bound, and which form the substantive *vincula* upon which action may be raised. They have no application to a document which is used merely as evidence of a fact. They do not mean that every piece of written evidence be probative under the statute." [6] "The facts recorded may be of importance; they may include express verbal agreements, or facts and circumstances inferring agreements; and they may thus or otherwise involve obligations—obligations arising *ex contractu* or *ex delicto*. But such writings are not written contracts or written obligations. They cannot form a substantive ground of action. They are only pieces of evidence."[1]

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[1] 1779, Mor. 16942.
[2] 1857, 20 D. 115.
[3] 1872, 10 M. 537.
[4] *Bryan* v. *Butters Bros.*, 1892, 19 R. 490.
[5] *Paterson* v. *Paterson*, 1897, 25 R. 144.
[6] *Thoms* v. *Thoms*, 1867, 6 M. 174, per Lord Benholme at p. 176; cp. *Neilson's Trs.* v. *Neilson's Trs.*, 1883, 11 R. 119.

740. An acknowledgment of money received in loan, though neither holograph nor tested, is accordingly admissible in evidence; though an improbative written obligation must be held *pro non scripto*, not merely as a ground of action, but also as a piece of evidence. To hold the opposite would be to place loan in a position isolated from all the other contracts of which proof is restricted to writ or oath, *e.g.* contracts relating to heritage where there has been *rei interventus*, obligations of relief granted by one co-acceptor of a bill to another, donation, trust, proof of constitution and resting-owing of a debt under the short prescriptions, etc. In short, "if loan requires to be proved by probative writing, it is the only contract (not requiring to be constituted *scripto*) in which such restriction exists."[2] For these reasons the Court found that the proof of the loan must be by writ or oath, but that such writ need not be holograph or tested; and remitted to the Sheriff to allow to the pursuer a proof of her averments *habili modo*, and to the defenders a conjunct probation. It may be added that in *Paterson* Lord Kyllachy expressed an opinion *obiter*, from which Lord Young dissented, that an IOU, being really a short form of written obligation, falls within the class of writings which must be either holograph or tested.[3]

741. The form which acknowledgment of loan may take, so far as regards its value as evidence, is not material. It may take the form of a simple receipt,[4] or of a receipt with an agreement to pay interest if demanded[5] or of a receipt "as per agreement,"[6] or of an acknowledgment "which I am to pay back with bank interest" (which was held of the nature of a bond and therefore after-stampable[7]), or "for which I shall account,"[8] or simply on loan.[9] The acknowledgment may be contained in one document, or inferred from the terms of several.[10] It need not be contemporaneous with the constitution of the loan, but it cannot effectively be granted after sequestration.[11]

SUBSECTION (4).—*Stamping.*

742. Certain writings are inadmissible in evidence unless they have been stamped, and in connection with the proof of loan the obligations of the Stamp Duties Acts must be kept in mind. Under the provisions of the Stamp Duties Act, 1891, s. 101, any writing whatsoever whereby any money amounting to £2 or upwards is acknowledged or expressed to have been received or deposited or paid, is a receipt in the sense of the Act and should be stamped. It would appear, however, that a mere acknowledgment needs no stamp.[1] If the acknowledgment contains a promise to pay a definite sum to a person named at a definite date or when required, it becomes equivalent to a promissory note and must be stamped.[2] An acknowledgment in such terms cannot be after-stamped; but where the amount promised to be repaid was indefinite, the document was held capable of being after-stamped, because not a promissory note.[3]

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[1] *Paterson* v. *Paterson*, 1897, 25 R. 144, per Lord Kyllachy at p. 173.

[2] *Ibid.*, at p. 175.

[3] *Ibid.*, per Lord Kyllachy at p. 176; *contra*, per Lord Young at p. 162.

[4] *Martin* v. *Crawford*, 1850, 12 D. 960; *Allan* v. *Murray*, 1837, 15 S. 1130; *Donaldson* v. *Walker*, 1711, Mor. 11511.

[5] *Robertson* v. *Robertson*, 1858, 20 D. 371.

[6] *Thomson* v. *Geekie*, 1861, 23 D. 693.

[7] *Tennant* v. *Crawford*, 1878, 5 R. 433.

[8] *Pirie's Reps.* v. *Smith's Exrs.*, 1833, 11 S. 473.

[9] *Welsh's Trs.* v. *Forbes*, 1885, 12 R. 851.

[10] *Ross* v. *Fidler*, 24th November 1809, F.C.

[11] *Carmichael's Trs.* v. *Carmichael*, 1929 S.C. 265.

SUBSECTION (5).—*Parole Evidence.*

743. The degree to which parole evidence may be admitted to fortify what written evidence there may be (where there is no written, there can of course be no parole, evidence) is not very clearly defined. Parole evidence is unquestionably admissible to prove the genuineness of a holograph document or of a signature to a writ not holograph; it was admitted to prove that the person who bore to sign the acknowledgment *per procurationem* of the firm had really authority to do so;[4] it is admissible to prove the date of a holograph writ, which does not prove its own date;[5] and other matters may also be proved by parole, *e.g.* whether the document relied on was granted by a bankrupt in fraud of creditors.[6] But if the documents are insufficient to prove the alleged loan, they will not be sufficient to let in parole evidence. This is clearly decided by the judgment of the majority of the Court,[7] and is reiterated by Lord Kinnear in the following passage: "The rule is that loans cannot be proved except by the writ of the borrower. It is quite consistent with the rule to admit parole evidence of facts extrinsic to the writing, in order to prove that it is in truth and in law the borrower's writ. It may be necessary, and it is perfectly competent, to prove handwriting or to prove delivery, or, it may be, to prove the authority of an agent. There may be other purposes which might be figured similar to these. But parole evidence is not admissible except for the purpose of enabling the creditor to prove the loan, not by the parole evidence itself, but by his debtor's writ. It cannot be admitted to prove the essential facts which go to constitute loan without violating the rule of law."[8]

SUBSECTION (6).—*Effect of Writ.*

744. With regard to the sufficiency of any writing to prove loan, it has been held in a long series of cases that "where a document or writing, admitting the receipt of money, is given to the party advancing the amount by the party who receives it, it will be presumed that an obligation to repay is thereby constituted, unless the party who has received the money shall establish that it was paid to extinguish some counter-obligation, or to satisfy some other demand which he had against the advancer." [1] The undernoted authorities may be referred to on the point.[2] It is to be noted that delivery of the acknowledgment by the debtor to the creditor is essential. "I am not aware of any case where a document not in the hands of the lender was held to prove a loan. It is its being in the hands of the lender that gives point and meaning to the document." [3] "The doctrine so repeatedly laid down is that he who gives another a document acknowledging the receipt of money, without qualification or explanation, as a *chirographum* to be preserved against him, infers an obligation to repay, and this obligation arises not so much from the document itself as from its possession by the other party. This is the case of *Ross* and a whole series of decisions." [4] A written acknowledgment of the receipt of money must always, of course, be taken subject to any qualification which it contains; [4] and where the letter brought forward as evidence of the loan is part of a correspondence, it is competent to take into account the correspondence as a whole. Nay, the failure to produce part of that correspondence may displace the usual presumption *in dubio* in favour of an obligation to repay.[5]

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[1] *Bryan* v. *Butters Bros.*, 1892, 19 R. 490; see also *Woodrow & Son* v. *Wright*, 1861, 24 D. 31.

[2] *Welsh's Trs.* v. *Forbes*, 1885, 12 R. 856; see also Hamilton Grierson, Law of Stamp Duties, 2nd ed., p. 62.

[3] *Vallance* v. *Forbes*, 1879, 6 R. 1099; *Blyth* v. *Forbes*, 1879, 6 R. 1102; see *Pirie's Reps.* v. *Smith's Exrs.*, 1833, 11 S. 473.

[4] *Tennant* v. *Crawford*, 1878, 5 R. 433; see *Thomson* v. *Bell*, 1897, 22 R. 16; *Henderson* v. *Dawson*, 1895, 22 R. 895.

[5] *Purvis* v. *Dowie*, 1869, 7 M. 764.

[6] *Williamson* v. *Allan*, 1882, 9 R. 859.

[7] *Haldane* v. *Spiers*, 1872, 10 M. 537.

[8] *Dunn's Trs.* v. *Hardy*, 1896, 23 R. 621, at p. 633; see also *Morison's Trs.* v. *Mitchell*, 1925, S.L.T. 231.

745. A bank cheque drawn in favour of the alleged borrower and indorsed by him, but in possession of the bank, not of the lender, will not instruct loan.[6] But if the alleged loan be one of a series of transactions between the parties, an entry in the creditor's books against the debtor will be sufficiently vouched by a cheque.[7] An entry in a depositor's pass-book with a savings bank of a payment made to a third party, who affixed his signature to the entry, has been held to establish loan.[8] The mere indorsation of a deposit-receipt will not infer loan,[9] yet, fortified by a copy of a letter from the debtor's agent to the debtor, it has been found to be sufficient.[10] The case of *Laidlaw*, indeed, seems to go farther in the latitude of proof allowed than any of its predecessors, the Lord Justice-Clerk (Moncreiff) expressing the opinion that writ of the authorised agent of the debtor was equivalent to the debtor's own.

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[1] *Haldane* v. *Speirs*, 1872, 10 M. 537, per Lord Cowan at p. 543.

[2] *Ross* v. *Fidler*, 24th November 1809, F.C.; *Thomson* v. *Geekie*, 1861, 23 D. 693; *Donaldson* v. *Walker*, 1711, Mor. 11511; *Allan* v. *Murray*, 1837, 15 S. 1130; *Martin* v. *Crawford*, 1850, 12 D. 960; *Fraser* v. *Bruce*, 1857, 20 D. 115; *Gow's Exrs.* v. *Sim*, 1866, 4 M. 578; *Thiem's Trs.* v. *Collie*, 1899, 1 F. 764 (holograph IOU in creditor's hands); *Chrystal* v. *Chrystal*, 1900, 2 F. 273; *Patrick* v. *Patrick's Trs.*, 1904, 6 F. 836; *Smith's Trs.* v. *Smith*, 1911 S.C. 653.

[3] *Haldane* v. *Speirs, supra*, per Lord Pres. Inglis at p. 541.

[4] *Duncan's Trs.* v. *Shand*, 1873, 11 M. 254.

[5] *M'Kean* v. *Adair*, 1864, 2 M. 392.

[6] *Haldane* v. *Speirs, supra*; *Scotland* v. *Scotland*, 1909 S.C. 505; contrast *Hope* v. *Derwent Rolling Mills*, 1905, 7 F. 837; *Gill* v. *Gill*, 1907 S.C. 532.

[7] *Robb* v. *Robb's Trs.*, 1881, 11 R. 881.

[8] *Fraser* v. *Bruce*, 1857, 20 D. 115.

[9] *Nimmo* v. *Nimmo*, 1873, 11 M. 446.

[10] *Laidlaw* v. *Shaw*, 1886, 13 R. 724.

The undernoted are cases in which the writing relied on has been held sufficient.[1]

SUBSECTION (7).—*Effect of Proof of Receipt of Money.*

746. When, either by writing or by reference to his oath, receipt of the money by the alleged debtor has been proved, the onus lies upon him of proving that the money was received upon some other footing than that of loan, *e.g.* by way of donation or in extinction of a claim upon the alleged creditor. He will be allowed to prove this *habili modo*, but it seems not quite settled whether that means that his proof will be limited to the writ or oath of his opponent.[2] As regards donation, there seems to be now no doubt that donation may be competently proved by parole.[3] From the tenor of their Lordships' opinions in *Paterson*,[4] it seems highly improbable that in future the rule applied by the Court will become more stringent.

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[1] *Robertson* v. *Robertson*, 1858, 20 D. 371; *Christie's Trs.* v. *Christie*, 1870, 8 M. 461. Contrast the following where the proof has been held insufficient: *Rutherford's Exrs.* v. *Rutherford*, 1861, 23 D. 1276; *Woodrow & Son* v. *Wright*, 1861, 24 D. 31; *Butchart* v. *Butchart*, 1863, 1 M. 1123.

[2] *Bishop* v. *Bryce*, 1910 S.C. 426.

[3] *Wright's Exrs.* v. *City of Glasgow Bank*, 1880, 7 R. 527, per Lord Shand at p. 535.

[4] *Paterson* v. *Paterson*, 1897, 25 R. 144.

LOANING.

See SERVITUDES.

LOBSTERS.

See FISHING.

LOCAL AUTHORITY.
LOCAL GOVERNMENT.

See BORROWING POWERS; BURGH; COUNTY COUNCIL; EDUCATION; POOR.

LOCAL GOVERNMENT BOARD.

See OFFICERS AND DEPARTMENTS OF STATE.

LOCALITY.

See TEINDS; TERCE.

LOCAL LOANS.

See BORROWING POWERS.

LOCAL OPTION.

See LICENSING LAWS.

LOCATIO CONDUCTIO.

LOCATION.

See HIRING.

LOCH.

See WATER AND WATER RIGHTS.

LOCK.

See THIRLAGE.

LOCKFAST PLACES.

See CRIME.

LOCOMOTIVES.

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Section 1.—Introductory.

747. Locomotives may from the point of view of the statutory provisions governing their use upon highways be divided into heavy locomotives and light locomotives. The provisions regulating the construction of heavy road locomotives and their use upon highways are chiefly contained in the Locomotive Act, 1861,[1] which repealed previous provisions in Turnpike or Bridge Acts regulating the use of locomotives on roads; the Locomotives Act, 1865,[2] and the Locomotives Amendment (Scotland) Act, 1878,[3] of which statutes the provisions, so far as unrepealed, were made permanent by the Expiring Laws Act, 1922,[4] ss. 1 and 4, and Schedule I.; and the Roads Act, 1920.[5] Special provision was made for the use of light locomotives upon roads by the Locomotives on Highways Act, 1896, s. 1, and Schedule.[6] By this statute light locomotives were exempted from the rules prescribed in the statutes above mentioned for the construction of locomotives and their use upon highways. On the first introduction of motor cars the law was content to leave their regulation to the statutes dealing with locomotives on highways, and they were classified as "light locomotives." They soon became the subject of separate legislation, and the law on this (by far the most common) form of locomotives on highways will be found in the article on Motor Cars. The law relating to such aspects of their use as are common to both light and heavy locomotives (*e.g.* lighting, licensing, and registration, etc.) will also be found there, and what follows in this article is applicable only to heavy locomotives.

Section 2.—Rules for Use.

748. When a locomotive is passing on any highway, it must be worked according to the following rules and regulations, viz.: (1) Two persons must be employed to drive or attend to the locomotive, one of whom must, when required, give assistance to any person with a horse or horses or horse-drawn vehicles meeting or overtaking the locomotive.[1] (2) When the locomotive is drawing more than three waggons, another person must be employed to attend to the waggons, and he must be seated at or remain near the rear of the last waggon with a view to observing and giving the assistance mentioned above.[2] In a case under a similar provision of the 1878 Act, now repealed, a conviction was upheld for the employment as one of such "persons" of a boy under fourteen years of age.[3] (3) So long as the fires of a locomotive are alight, or the locomotive contains in itself sufficient motive power to move it, one person must remain in attendance whilst it is on any highway, although it is stationary.[4] (4) The whistle of a locomotive must not be sounded for any purpose whatever. The cylinder taps must not be opened within sight of any person riding, driving, leading, or in charge of a horse upon the road. Steam must not be allowed to attain a pressure such as to exceed the limit fixed by the safety valve, so that no steam shall blow off when the locomotive is upon the road.[5] (5) A locomotive must be instantly stopped, on the person preceding the same, or any other person with a horse, or carriage drawn by a horse, putting up his hand as a signal to require the locomotive to be stopped.[6] (6) Any person in charge of a locomotive must provide for its lighting in terms of the Road Transport Lighting Act, 1927.[7] Non-compliance with the above provisions entails on the owner of a locomotive a penalty not exceeding £10, but the owner may, on proving that he has incurred such penalty through the negligence or wilful default of any person in charge of the locomotive, recover summarily from such person the whole or any part of the penalty incurred.[8] (7) Locomotives may not be driven over suspension bridges, nor over any bridge upon which a notice has been placed that it is insufficient to carry weights beyond the ordinary traffic of the district.[9] Damage caused to bridges by locomotives must be made good by the owners.[10]

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[1] 24 & 25 Vict. c. 70.
[2] 28 & 29 Vict. c. 83.
[3] 41 & 42 Vict. c. 58.
[4] 12 & 13 Geo. V. c. 50.
[5] 10 & 11 Geo. V. c. 72.
[6] 59 & 60 Vict. c. 36.

SECTION 3.—RULES FOR CONSTRUCTION.

749. It is not lawful to use on any highway a locomotive constructed otherwise than in accordance with the following provisions: (1) A locomotive not drawing any carriage, and not exceeding in weight 3 tons, must have the tires of the wheels thereof not less than 3 inches in width, with an additional inch for every ton or fraction of a ton above the first 3 tons; (2) a locomotive drawing any waggon or carriage must have the tires of the driving wheels thereof not less than 2 inches in width for every ton in weight of the locomotive, unless the diameter of the wheels exceed 5 feet, when the width of the tires may be reduced in the same proportion as the diameter of the wheels is increased; but in such case the width of the tires must not be less than 14 inches; (3) a locomotive must not exceed 9 feet in width or 14 tons in weight, except as mentioned below; (4) the driving wheels of a locomotive must be cylindrical and smooth-soled, or shod with diagonal cross-bars of not less than 3 inches in width, or more than $\frac{3}{4}$ inch in thickness, extending the full width of the tire, and the space intervening between each such cross-bar must not exceed 3 inches (the addition of metal spikes to the cross-bars for the purpose of obviating slipping in frosty weather is a contravention of this provision); [1] (5) the exact and true weight of a locomotive, including necessary water and coals, must be legibly written in letters of not less than 1 inch in length, and affixed to some conspicuous part of the locomotive.[2]

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[1] Local Government (Scotland) Act, 1908 (8 Edw. VII. c. 62), s. 25 (1) (*a*) and (*b*).

[2] *Ibid.*, s. 25 (1) (*c*).

[3] *Smith* v. *Wood*, 1882, 10 R. (J.) 31, 5 Coup. 186.

[4] 8 Edw. VII. c. 62, s. 25 (2).

[5] 1865 Act, s. 3 (4).

[6] 1865 Act, s. 3 (5).

[7] 17 & 18 Geo. V. c. 37. See MOTOR CARS, *s.v.* "Lighting."

[8] 1865 Act, s. 3, and Local Government (Scotland) Act, 1908, s. 25 (5).

[9] 1861 Act, s. 6.

[10] 1861 Act, s. 7.

750. The owner of any locomotive used contrary to the foregoing provisions is for every such offence liable to a fine of £5. The road authority of any county or burgh may, on the application of the owner of any locomotive exceeding 9 feet in width or 14 tons in weight, authorise such locomotive to be used on any highway within the areas respectively above mentioned, or part of any such highway, under such conditions (if any) as to them seem desirable.[2]

751. Steam locomotives used on any highway must be constructed on the principle of consuming their own smoke, subject to a penalty of £5 for every day on which a locomotive is used which either is not so constructed or does not consume, so far as practicable, its own smoke.[3]

752. The weight of a locomotive and the name and residence of its owner must be conspicuously and legibly affixed thereon, under a penalty for non-observance of the regulation.[4]

SECTION 4.—WEIGHTS PERMISSIBLE.

753. A waggon drawn by a locomotive may not carry a greater weight than 1½ ton for each pair of wheels, unless the fellies, tires, or shoes are 4 inches or more in breadth; nor carry a greater weight than 2 tons for each pair of wheels, unless the fellies, tires, or shoes are 6 inches or more in breadth; nor carry a greater weight than 3 tons for each pair of wheels, unless the fellies, tires, or shoes are 8 inches or more in breadth; and for every single wheel, one-half of that permitted to be carried on a pair of wheels. In no case may a waggon carry a greater weight than 4 tons on each pair of wheels, or 2 tons on each wheel; but if the waggons have springs upon each axle, they may be allowed to carry one-sixth more weight in addition to the above-mentioned weight upon each pair of wheels.[1] The above regulations do not extend to a waggon carrying only one block, plate, cable, roll, vessel of stone or metal, or other single article being of greater weight than 16 tons, but the fellies, tires, or shoes of such waggon shall not be less than 8 inches in breadth, and any damage arising from the user of any such waggon shall be deemed to be damage caused by excessive weight within the meaning of section 57 of the Roads and Bridges (Scotland) Act, 1878.[2]

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[1] *Milne & Co.* v. *Maclennan*, 1902, 4 F. (J.) 79; 3 Adam 634.

[2] 1878 Act, s. 3, made permanent by the Expiring Laws Act, 1922 (12 & 13 Geo. V. c. 50), ss. 1, 4, Schedule I.

[3] 1878 Act, s. 5, repealing 1861 Act, s. 8, and made permanent by the Expiring Laws Act, 1922 (12 & 13 Geo. V. c. 50), ss. 1, 4, and Schedule I.

[4] 1861 Act, s. 12, and 1865 Act, s. 7.

Section 5.—Registration and Licensing.

754. Registration and licensing of locomotives is regulated by the Finance Act, 1920,[3] s. 13, and the Roads Act 1920,[4] ss. 5 and 6. Regulations governing these matters may be made by the Minister of Transport.[5] For further details see the article on Motor Cars, *s.v.* "Registration and Licensing."

Section 6.—Speed.

755. The speed of locomotives on any turnpike road or public highway is restricted to 4 miles an hour, and through any city, town, or village to 2 miles an hour. A penalty not exceeding £10 is imposed for a breach of this regulation.[6]

Section 7.—By-laws.

756. The road authority of any county or burgh may make by-laws as to the hours during which locomotives are not to pass over the highways situate within these areas, but not for more than eight consecutive hours in twenty-four, and for regulating the use of locomotives on any highway, or preventing or regulating such use upon every bridge where the authority is satisfied that such use would be attended with damage to the public from the narrowness, inclination, or imperfect construction of such bridge or highway, and any person in charge of a locomotive acting contrary to such by-laws shall be liable to a fine not exceeding £5.[7] By-laws made under this provision must be confirmed by the Secretary of State for Scotland.[8] A complaint alleging a contravention of such a by-law does not require to libel the Locomotive Act 1861, or to set forth, as required in s. 6 of that Act, that a notice was placed at the bridge that it was insufficient for the ordinary traffic of the district.[9]

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[1] 1861 Act, s. 4.

[2] 41 & 42 Vict. c. 51; Roads Act, 1920, s. 16.

[3] 10 & 11 Geo. V. c. 18.

[4] 10 & 11 Geo. V. c. 72.

[5] Roads Act, 1920, s. 12.

[6] 1865 Act, s. 4, made permanent by the Expiring Laws Act, 1922 (12 & 13 Geo. V. c. 50), ss. 1, 4, and Schedule I.

[7] 1878 Act, s. 6.

[8] Secretary for Scotland Act, 1885 (48 & 49 Vict. c. 61), s. 5 (1).

[9] *Cadenhead* v. *Milne*, 1887, 14 R. (J.) 58; 1 White 441.

LOCUS DELICTI.

See CRIME; JURISDICTION.

LOCUS PŒNITENTIÆ.

See CONTRACT; OBLIGATION; PERSONAL BAR.

LOCUS STANDI.

See PRIVATE BILL PROCEDURE.

LODGER.

See FRANCHISE.

LOGBOOK.

See SHIP.

LOOSING OF ARRESTMENT.

See ARRESTMENT.

LORD ADVOCATE.

See CRIME (ADMINISTRATION); CROWN.

LORD CLERK REGISTER.

See REGISTRATION.

LORD JUSTICE-CLERK.

LORD JUSTICE-GENERAL.

See JUSTICIARY, HIGH COURT OF.

LORD LIEUTENANT.

See LIEUTENANT.

LORD TREASURER'S REMEMBRANCER.

See EXCHEQUER.

LORDS, HOUSE OF.

See PARLIAMENT.

LORDS, HOUSE OF (AS APPELLATE TRIBUNAL).

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SECTION 1.—HISTORY.

757. In Scotland up to the earlier part of the fifteenth century appeals were competent in civil cases to the King and his Council, and also to Parliament. An original jurisdiction was sometimes exercised by the Scots Parliament, but this being attended with inconvenience, an Act was passed in 1424 providing that bills of complaint should not be determined by Parliament, but by the judges of the ordinary Court; and if they refused to execute the law evenly, recourse was to be had to the King. In the following year the Session of James I. was instituted by the Act 1425, c. 65, the Court being vested with jurisdiction to "conclude and finally determine all and sundry complaints, causes, and quarrels that might be determined before the King and his Council." This Act was confirmed and explained by the Act 1457, c. 62, which provided that causes before the Session "sall be utterly decided and determined be them, but [*i.e.* without] ony remeid of appellation to the King or the Parliament." It is doubtful whether these Acts were ever in strict observance, or whether, in so far as the right of appeal was concerned, they did not rapidly fall into desuetude. Appeal to Parliament by "Falsing of Dooms" of the Justiciars and Judges Ordinary certainly continued, for provision is made for its regulation by the Act 1503, c. 95. Stair states that at the time of the institution of the Court of Session appeals were in vigour and observance—though he adds that they then ceased because the "Senators of the College of Justice had the same power and authority that the Lords of Session and Daily Council had before; and so their final sentences were ultimate, without appeal to King or Parliament." [1] He admits, however, that one form of appeal, "by protestation for remeid of law," continued; and he enters into an

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GENERAL AUTHORITIES.—See Stair, iv. 1, *passim*; Ersk. i. 3, 20; Mackay, Practice of the Court of Session, i. 37; May, Parliamentary Practice, 48, 340; Preface to Robertson's Appeals; Preface to Paton's Appeals, vol. vi.; Hale, Lords' Jurisdiction; Report of Lords' Debate on Appellate Jurisdiction, 1856, Report of Lords' Committee, etc., in 2 Macq. 577.

[1] Stair, ii. 3, 63; iv. 1, 31, 55, 56.

inquiry whether it would be beneficial that this should be extended, or limited to the cases in which the Court of Session had exceeded its jurisdiction.

758. The Act 1587, c. 39, refers to decisions pronounced by Parliament upon cases which must have been brought before it by way of appeal, and Erskine [1] and Balfour [2] note cases of the same kind. The nature and extent of the right were, however, matter of controversy, and in 1674 gave rise to a memorable dispute between the judges of the Court of Session (over which Lord Stair then presided) and the bar. The dispute arose in the course of a suit between the Earl of Dunfermline on the one hand, and the Earl of Callendar and his son, Lord Almond, on the other.[3] The defenders appealed to Parliament. This was treated by the judges as contempt of Court, and they summoned Lord Callendar and his counsel, who had signed the appeal, to answer for their conduct. The latter refused to withdraw the appeal, and the judges then complained to the King (Charles II.). He addressed a letter to the Court expressing his "abhorrence of appeals," peremptorily forbidding them for the future, and ordering at the same time that any advocate who refused to disown them should be disbarred. Meanwhile other appeals of the same kind were taken, and further complaint was made to the King. Most of the advocates supported their brethren and seceded from the Court, and they were prohibited by the Privy Council from returning to within twelve miles of Edinburgh. This order affected about fifty of their number, who were disbarred for nearly two years. The dispute was, however, settled by a compromise in 1676. The advocates disowned and disclaimed all "appeals which sist process and stop execution, as being contrair to law and inconsistent with the honour of the Lords of Session and prejudicial to the subjects in their just rights." They were then restored by the Court to practice, the Act of Sederunt [4] which reponed them declaring "that it was never allowed by the Lords to quarrel or impugn their sentences or interlocutors upon iniquity, and that they will in no ways suffer or allow the same." This goes further than the concession of the advocates, but it was understood that the right to protest to Parliament for remeid of law without stay of execution was recognised in the compromise, and it was never relinquished.

759. Matters remained in this state until the Revolution, when the Convention of Estates [5] declared the banishment of the advocates to be illegal, and it was made one of the articles of the Claim of Right (c. 13) "that it is the right and privilege of the subjects to protest for remeid of law to the King and Parliament against sentences pronounced by the Lords of Session, providing the same do not stop execution of these sentences." From the Revolution until the Union in 1707 protests to

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[1] Inst. i. 3, 20.

[2] Practicks, 268.

[3] *Earl of Dunfermline* v. *Earl of Callendar*, 1676, Mor. 2941; Stair's Decisions, Feb. 5, 1674, Feb. 16, 1676; Forbes, Decisions, preface.

[4] Jan. 25, 1676.

[5] 1689, c. 18.

Parliament for remeid of law were made under this condition. They do not appear, however, to have been numerous.

760. At the time of the Union the right of appeal to Parliament was much debated. It was contended upon the one side that it was part of the common law of Scotland and inherent in the subjects; upon the other, that if the right of review were conceded, the law of Scotland might be seriously tampered with by a tribunal in London composed chiefly of English peers. A proposal was made that appeal should be to a Court sitting in Scotland, and consisting of certain peers delegated annually or triennially by the House of Lords.[1] This proposal, however, was not carried into effect. No express provision was made in the Treaty of Union for appeal from the Courts of Scotland to the British Parliament, though by the 19th article their decisions were expressly protected from review by the Courts of England. An appeal was, however, taken to the House of Lords in the first session of the British Parliament, which was followed two years afterwards by another, and the general right of appeal against final judgments on the merits in civil cases has never since been disputed.

SECTION 2.—EFFECT OF APPEAL ON EXECUTION.

761. At the time of the Union the rule in English and Irish cases was that appeal stopped execution. In 1709 it was enacted by Order that "after appeal shall be received by this House from any sentence or decree pronounced in any Court of Scotland, and an Order made by this House for the respondent to answer the said appeal, and notice of such Order duly served upon the respondent, the sentence or decree so appealed against from such time ought not to be carried into execution by any process whatsoever." This was a direct infringement of the Scots Claim of Right, and was productive of great abuse, appeals being frequently taken merely for the purpose of obtaining delay. This was remedied, however, by an Act[2] which gave power to the "Division to which the cause belongs, or any of the four judges thereof, to regulate all matters relative to interim possession or execution and payment of costs and expenses already incurred, according to their sound discretion, having a just regard to the interests of the parties as they may be affected by the affirmance or reversal of the judgment or decree appealed from." The provisions of the Order and Statute are still in force.

SECTION 3.—CONSTITUTION OF TRIBUNAL.

762. The constitution of the House of Lords as an appellate tribunal remained unchanged from the Union until the passing of the Appellate Jurisdiction Act, 1876.[3] While in practice the disposal of judicial cases has been left in the hands of the law lords, all peers of Parliament are entitled to sit and vote, and in various cases the right has been exercised. The last occasion upon which the matter was discussed in modern times was in the case of *The Queen* v. *O'Connell*, in 1844, when party feeling ran high, and a number of the lay peers seemed inclined to exercise their right to vote in order to secure O'Connell's condemnation. But owing to the timely intervention of Lord Wharncliffe, who urged that it would be a scandal to allow personal or political feeling to enter into a judicial decision, the lay peers abstained from voting.[1] In the case of *Bradlaugh*,[2] Lord Denman, a lay peer, was present, and expressed his opinion in support of Lord Blackburn, who dissented from the judgment.[3] An attempt was made in 1873 to take away the appellate jurisdiction of the House of Lords, and to establish a new Court in England, composed chiefly of English common-law judges, as an Imperial tribunal of review. This attempt was, however, frustrated,[4] but the judicial arrangements then existing, which certainly were not free from defect, and afforded some justification for the change proposed, were materially improved by the Appellate Jurisdiction Act above cited. This Act was amended by subsequent Acts of 1887,[5] 1913,[6] and 1929,[7] and the composition and procedure of the House, as an appellate tribunal, are now regulated by these Acts, and the Standing Orders and Directions which have been issued to carry them into effect.

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[1] Defoe, History of the Union, 158.

[2] 48 Geo. III. c. 157, s. 17.

[3] 39 & 40 Vict. c. 59.

763. Before the passing of the Act of 1876 there was no provision for securing a sufficient attendance of law lords for the hearing of appeals, cases being sometimes disposed of by a single judge. Sec. 5 of that Act, however, provides that no appeal shall be heard and determined unless there be present not fewer than three "Lords of Appeal," a term which is defined to include the Lord Chancellor of Great Britain for the time being, the Lords of Appeal in Ordinary appointed under the Act, and such peers of Parliament as are for the time being holding or have held "high judicial office"; *i.e.* (s. 25) the office of Lord Chancellor of Great Britain or Ireland, or of paid judge or member [8] of the Judicial Committee of the Privy Council, or of Lord of Appeal,[8] or judge of one of His Majesty's Superior Courts of Great Britain and Ireland. By the Supreme Court of Judicature Act, 1881,[9] the President of the Probate, Divorce, and Admiralty Division of the High Court of Justice for the time being is also declared to be a Lord of Appeal. The original number of Lords of Appeal in Ordinary authorised to be appointed under the 1876 Act was four.[10] This number was increased by two under the 1913 Act and by one more under the 1929 Act. The total number accordingly is now seven.

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[1] M'Carthy, History of our Own Times, i. 296.

[2] *Bradlaugh* v. *Clarke*, 1883, 8 App. Cas. 354.

[3] May, Parliamentary Practice, 340.

[4] See letter by Lord Fraser, Journal of Jurisprudence, xix. 195.

[5] 50 & 51 Vict. c. 70.

[6] 3 & 4 Geo. V. c. 21.

[7] 19 & 20 Geo. V. c. 8.

[8] 1887 Act, s. 5.

[9] 44 & 45 Vict. c. 68, s. 4.

[10] Secs. 6 and 14.

SECTION 4.—QUALIFICATIONS AND DUTIES OF LORDS OF APPEAL.

764. The Lords of Appeal in Ordinary under the Appellate Jurisdiction Acts are appointed by the Crown (s. 6), and must have held high judicial office for two years, or have been for fifteen years in practice at the bar. They hold office during good behaviour, and may be removed on the address of both Houses of Parliament. They receive salaries of £6000 a year, take rank as barons, and during their lifetime [1] are entitled to sit and vote in the House of Lords. Their dignity as Lords of Parliament does not descend to their heirs. The Lords of Appeal in Ordinary, if Privy Councillors, are bound to sit and act as members of the Judicial Committee of that body (s. 6), and if qualified to be appointed as judges of the Court of Appeal in England are *ex officio* judges of that Court.[2] They are entitled to pensions after fifteen years service or disablement by permanent infirmity (s. 7). With the view of preventing delay in the administration of justice, it is provided (s. 8) that the House may sit for the purpose of hearing and determining appeals during any prorogation of Parliament at such time and in such manner as may be-appointed by order of the House, made during the preceding session, and even during a dissolution of Parliament if authorised by His Majesty under his sign-manual (s. 9). See APPEAL.[3]

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[1] 1887 Act, s. 2.

[2] 1913 Act, s. 2.

[3] Vol. I. p. 406, *ante*.

LOST PROPERTY.

See PROPERTY.

LOST WRITINGS.

See ACTION.

LOTTERY.

See GAMING, BETTING, AND LOTTERIES.

LUCRATIVE SUCCESSION.

See PASSIVE TITLE.

LUGGAGE.

See CARRIAGE BY LAND; CARRIAGE BY SEA; INNKEEPERS; RAILWAYS AND CANALS.

LUNACY ACTS.

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LYON KING-OF-ARMS.

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Section 1.—History of Office.

765. The Lord Lyon King-of-Arms is His Majesty's principal Officer of Arms in Scotland, and the office is one of the most ancient in the country.[1] According to Sir James Balfour of Kinnaird, who had access to official records not now extant, Lyon and the Heralds officiated at the coronation of Robert II. on 27th May 1371. The first extant reference to the office by name is a payment to "Lyoun Herauld" in 1377.[2] In 1387 he is styled *Leo Rex Heraldorum*,[3] and from 1412–13 he is styled *Leo Heraldus, Rex Armorum*.[4] There is evidence that in Scotland, on the rise of the science of Armory, heraldic duties were conferred upon an earlier Celtic official, the Royal Seannachie,[5] for many of the privileges and functions, as well as the state robes of the Lord Lyon, can be traced to a pre-heraldic and Celtic era. At the coronation of the King of Scots the consent of Lyon was necessary before the King could be crowned,[6] and in 1557 the Royal Commissioners negotiating with the Court of France affirmed that the Crown of Scotland was an imperial crown held from "na realme christnit, but God and the Lyone allenarly,"[7] whilst at the coronation Lyon wore the long red robe and proclaimed the King's descent, the functions performed by the Seannachie at the coronation of Alexander II.[8] The circumstances indicate that the Lord Lyon was the Seannachie entrusted with the Royal genealogy, and whose certificate was the necessary evidence that the candidate for the Crown was in fact a member of the Royal race.

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[1] Nat. Lib. MSS., 34–3–22, c. 15.

[2] Exchequer Rolls, ii. 553.

[3] *Ibid.*, iii. 170.

[4] Lord High Treasurer's Accounts, i. cxciv.

[5] P. W. Joyce, LL.D., Social Life in Ancient Ireland, pp. 136, 460.

[6] Compare the "Official Inauguration" of Celtic Kings, Social Life in Ancient Ireland, p. 46.

[7] Lindsay of Pitscottie, Scot. Text Soc. Ed., ii. 126.

[8] Privy Council, 2nd Series, ii. 393; Balfour, Heraldic Tracts, pp. 34, 40, 42; Skene, The Coronation Stone, p. 47; and plate from Bower's edition of Scotichronicon.

766. Although Lyon is in some respects analogous to Garter King-of-Arms in England, Garter is under control of the Earl Marshal, whilst the office of Lord Lyon has from the earliest time been "an immediate fief of the Crown," and subject neither to the Constable nor the Marischal.[1] He is designated by the sovereign, "Our Lyon Herauld, King-of-Armes," [2] and more recently "Our Lyon King-of-Arms in that part of Our Kingdom of Great Britain called Scotland." [3] He may as one of His Majesty's ministers advise the Crown directly in armorial matters.[4] "No herald in Europe exercised such powers of jurisdiction, was vested with such high dignity, or possessed so high a rank. In his armorial jurisdiction, Lyon stands in the place of the King." [5] He is "both an Officer of the Crown and of the Kingdom," [6] an old distinction among the Officers of State referred to by Sir George Mackenzie.[7] He is one of the great officers who are *ex officio* the King's Lord-Lieutenants,[8] and until the close of the sixteenth century he was *virtute officii* a Privy Councillor.[9] His person is so sacred that to strike or deforce him is high treason.[10] To deforce Lyon is, probably, still treason, as anything done to, or against, him in his official capacity is as if it were done to, or against, the King's own person. He has, under the Crown, immediate and complete control of all arms, badges, and signes armorial,[11] both military and civil. In the Middle Ages he was frequently employed as ambassador to foreign Courts, and on account of this and his palace duties he appointed a Lyon-Depute to execute his routine duties. As controller of the Messengers-of-Arms the Lord Lyon has been described as essentially at the head of the executive department of the Law in Scotland.[12]

SECTION 2.—TITLE.

767. Lyon's full title is "The Right Honourable the Lord Lyon, King-of-Arms," and this received statutory confirmation under the Act 1672, c. 74, ratifying "the Style, Title, Liberties, Preheminencies, Jurisdiction, and Casualties pertaining and competent to the said office, and of old used and wont, or which did ever pertain to the said office at any time bygone."[1] The prefix "Right Honourable," which (like the similar prefix of the Lord Provost of Edinburgh) probably originated in Lyon's Privy Councillorship, is first found in 1554,[2] and in use both immediately before, and after, the statutory ratification.[3] The title "Lord Lyon King-of-Arms" is first found in the Armorial Register of Sir David Lindsay of the Mount (secundus),[4] of date between 17th April 1599 and 16th November 1600,[5] which is the year following the first appearance of the title "Lord Advocate."[6] It has been borne by every successive Lyon, from Lindsay to the present time, acknowledged by Parliament 22nd July 1663,[7] by the Court of Session,[8] by the Royal Commissioners of 1822 and 1870,[9] and by the Crown itself.[10] The title is in precisely the same legal position as the Lord Advocate's; never specifically conferred by the Crown, but arising out of the clause of "Rights and Privileges of the Office." The proper form of address is "The Lord Lyon"; the term "Lyon King" can only be described as "slang." Legitimately used in poetry, it probably originated from a misunderstood transcript of a signature "Lindsa of the Mont, Lyon, King,"[11] a vernacular version of the signature "Lyon, Rex Armorum."[12]

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[1] J. H. Stevenson, Heraldry in Scotland, p. 41.

[2] Sir J. Balfour of Denmilne's Commission, Privy Council, 2nd Series, iv. 156; Draft for Erskine of Cambo's Commission, Lyon Office Record "Old Note" Book, p. 230.

[3] Royal Warrant for Thomas Dundas of Fingask, 31st March 1769; Royal Warrant for His Excellency Robert Keith, 17th March 1769, Lyon Register, i. 174; Patent, Sir James Balfour Paul, 12th March 1890: J. H. Stevenson, K.C., Heraldry in Scotland, p. 454.

[4] *Scott of Thirlestane*, 18th December 1700; Mark Napier, Partition of the Lennox, p. 220.

[5] Lyon Depute Boswell, Lyon Office Record "Old Note" Book, p. 25.

[6] *Lyon* v. *Usher*, 1685, "The Lyon's Representation to the Committee of the Council," papers in Lyon Office.

[7] Sir George Mackenzie of Rosehaugh, Works, ii. 537.

[8] Denmilne MSS., Nat. Lib., 33–2–7.

[9] Rymour, Fœdera, xii. 230; Calendar of Documents relating to Scotland, vol. iv., Nos. 101–5; Great Seal, v. 1990.

[10] Acts, ii. -2, -4, 22nd November 1526; Privy Seal, vol. ii., No. 1963; Robertson's Parliamentary Records, p. 681.

[11] Privy Council, 2nd Series, iii. 156, 157, 555, 594; 1672, c. 47; 1672, c. 74; *Macdonnell* v. *Macdonald*, 1826, 4 S. 371.

[12] G. Seton, Law and Practice of Heraldry in Scotland, p. 41.

SECTION 3.—REGALIA.

768. The Lyon Regalia consists of:

1. A crown of gold, similar to the Royal Crown of Scotland but unjewelled,[13] borne on a green velvet cushion. It may be worn "on all solemn occasions,"[14] and is still the crown assigned to Lyon for heraldic purposes,[15] but since the coronation of George II. those supplied for actual use have been similar to that of Garter.[16] This consists of a circlet with the motto *Miserere mei Deus, secundum magnam misericordiam tuam*, from which rise eight upright acanthus leaves, inside which there is the usual ermine-lined crimson cap with gold tassel.

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[1] Acts, folio edition, viii. p. 123: also 30 & 31 Vict. c. 17, s. 1.

[2] Haddington *Declaratio*, Riddell MSS., Signet Library, vol. li.

[3] *E.g.* Lyon Court Books, 8th August 1663 and 6th November 1677; Seton, Law and Practice of Heraldry, pp. 183, 184; 1758, 1771, 1832.

[4] Earl of Crawford's Library. [5] Preface to W. Rae Macdonald's copy, in Lyon Office.

[6] Omond, History of the Lord Advocates, p. 74.

[7] Acts, viii. 458; also Acts, 1645, c. 201; 1663, c. 52; 1662, c. 15.

[8] *Sundry Barons* v. *Lord Lyon*, 1673, Fountainhall's Decisions, p. 393; *Stewart-Mackenzie* v. *Fraser-Mackenzie*, 1920 S.C. 764.

[9] Tenth Report on Scottish Courts of Justice, 1822, p. 14; Report of Commissioners on Scottish Offices, 1870, p. 5.

[10] Statutes of the Order of the Thistle, 1783; Earl of Kinnoull's Commission, 26th May 1796; Stevenson, Heraldry in Scotland, ii. 453.

[11] Spalding Club Miscellany, ii. 215.

[12] Calendar of Documents relating to Scotland, vol. iv, No. 1421; Rymour, Fœdera, xi. 836.

[13] Nat. Lib. MS., 34-3-22, c. 11. [14] *Ibid.*, p. 23.

[15] Lyon Register, vol. iii. fol. 1, June 1816.

[16] Letter from Garter Young to Lord Lyon Burnett, 1st January 1868, Lyon Office.

2. A collar similar to that of the Knights of the Thistle.[1] Since 1727 the collars supplied (through the Earl Marshal) have been golden collars of SS, like those of English Kings-of-Arms.

3. Baton of silver gilt, overlaid with blue enamel, powdered with roses, thistles, and fleurs-de-lis.

4. An oval badge shewing on one side the figure of St. Andrew, on the other the Royal Arms of Scotland, the whole surmounted by the Crown of Scotland, suspended from the triple chains of the Order of the Thistle, but on informal occasions alternatively worn pendant from a green ribband "of moderate breadth"[2] across the left shoulder.[3]

5. A velvet tabard, with the Royal Arms embroidered in gold, quartered according to the Scottish version. From 1820 tabards quartered English fashion were supplied at coronations, but in 1928 the Scots quarterings were restored in obedience to the command of His Majesty.

6. A crimson velvet robe, lined with silver-coloured satin and edged with a broad band of gold lace, having an ermine cape similar to that of a Scots peer; cord and tassels of crimson silk and silver.[4] This, and a full-bottomed wig, as worn by Sir Alexander Erskine, form the Lord Lyon's judicial robes.

7. As King-of-Arms of the Order of the Thistle, Lyon wears the full dress doublet, hose, etc., of the Brethren as laid down in s. 2 of the statutes—excepting the mantle.[5] Lyon's mantle is of green satin lined with white, having on the left shoulder the badge of St. Andrew.[6] When riding in state, or "his train being carried," he is attended by two pages in white livery with red collars, cuffs, hats, and facings.[7]

SECTION 4.—OFFICIAL ARMS.

769. Lyon's official arms are: Argent, a lion sejant affronté Gules, holding in his dexter paw a thistle slipped vert, and in his sinister paw an escutcheon of the second; on a chief azure, a saltire of the first. Around the shield are placed his collars and badge, and above it, either or both, his official crowns, and in saltire behind it two Lyon batons. Lyon is, *virtute officii*, entitled to supporters.[8]

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[1] Lyon Register, vol. iii. fol. 1; Portrait, Lord Lyon Brodie of Brodie; Heraldry in Scotland, p. 449.

[2] Heraldry in Scotland, p. 54, note 2; Statutes of the Order, 17th July 1717.

[3] Portrait, Lord Lyon Balfour of Kinnaird, *penes* Lord Belhaven.

[4] Account of the Office of Heraulds, c. 17, pp. 23, 30 (Nat. Lib. MS., 34–3–22); Account of the Royal Visit, 1822, pp. 94, 199; Thomas Sommers, Plates of the Riding of Parliament, No. 27; Heraldry in Scotland, p. 449.

[5] Portraits, Lord Lyons Brodie of Brodie (at Brodie) and Hook-Campbell of Bangeston (at Stackpoole).

[6] Statutes of the Order, s. xii, 3rd December 1703.

[7] Account of the Royal Visit, 1822, p. 199; *Lyon* v. *Usher*, 1685, papers in Lyon Office.

[8] Sir David Lindsay's Armorial, 1542; Lindsay (Secundus) Armorial, 1599–1600; Erskine of Cambo, Lyon Register, 1672; Hook-Campbell of Bangeston, 23rd October 1773, Lyon Register, i. 503.

SECTION 5.—APPOINTMENT.

770. The Lord Lyon is appointed by the King, on the recommendation of the Secretary of State for Scotland, his commission having invariably been for life,[1] often for two lives, until 1927, since when it has been until the appointee attains the age of seventy years. The Lord Lyon, like the Sheriffs, has still ministerial duties, but the office has always been fundamentally a judicial one. In 1822 the qualification recommended was "a member of the Faculty of Advocates of not less than three years' standing,"[2] and the Scottish legal societies in 1927 expressed the view that, failing any qualified advocate, Lyon should be a member, with suitable attainments, of one of the other Scots legal societies. Formerly all Lyon patents bore the clause *Cum honore titulo et dignitate aurati equitis*, and if he possessed no estate of his own, directed him to be designated "of Luthrie."[3] The baronetcy inherited along with the office by Sir Alexander Erskine of Cambo, and the dislike of Scotland at the accession of George I., led to the patent of Brodie of Brodie being drawn in London, without reference to Scots sources. This, and the appointment of the Earls of Kinnoul, have led to the clause of knighthood being overlooked in recent Lyon Commissions. Formerly crowned with much pomp,[4] Lyon is now sworn in before the Lords of Council and Session, the heralds attending, baton in hand, at the clerk's table, their former post in Parliament.[5] Thereafter the "blessing of the Lyon" is performed in St. Giles by the Dean of the Thistle.

SECTION 6.—PRECEDENCE.

771. The Lord Lyon from the very nature of his office had no personal precedence, other than his knighthood and, officially, the high position he occupies as the King's Lieutenant. When in his tabard, no less position can be assigned without affront to His Majesty's coat—for such it is—and his privilege is to stand on the steps of the throne, one degree below the King or his representative.[6] Within the City of Edinburgh the Lord Provost stands at the right and the Lyon at the left of the throne. In his personal capacity Lyon ranked before all knights, and next to the Senators of the College of Justice by "ane speciall grant from his Majestie."[7] By the Treaty of Union, Article 24, his precedency is left to the Crown, and under the Royal Warrant of 1905 he received personal precedency before Knights Bachelor. On all public occasions it is Lyon's privilege to walk immediately before the King or his representative—or before the Honours, if these are being carried before the Presence—of which Lyon is thus the herald.[1]

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[1] J. H. Stevenson, K.C., Heraldry in Scotland, pp. 452–454.

[2] Tenth Report on Scottish Courts of Justice, p. 43; printed letter, J. H. Stevenson, K.C., to Sir John Gilmour, Bart., 9th November 1926.

[3] Sir William Stewart of Luthrie, 20th February 1567–8, Privy Seal, xxxvii. pl. 44; Sir David Lindsay of Rathillet, 13th September 1568, Privy Seal, xxxviii. pl. 34; Sir David Lindsay of the Mount, Xmas 1591, Great Seal, v. 1990; Sir Jerome Lindsay of Annatland, 8th August 1620; Heraldry in Scotland, p. 451.

[4] H. Arnot, History of Edinburgh, Appendix X.

[5] *Lyon* v. *Usher*, 1681, papers in Lyon Office.

[6] Heraldry in Scotland, ii. 451, Answers to Slazer's Queries; *Lyon* v. *Usher*, 1681, papers in Lyon Office; Balfour's Heraldic Tracts, p. 37.

[7] Account of the Office of Heraulds, 1661, fol. 33; Nisbet's System of Heraldry, vol. ii. pt. iv. p. 166.

SECTION 7.—EMOLUMENTS.

772. The Lord Lyon was formerly remunerated by the "profits of his Court" (transferred to the Treasury in 1867) and a salary which seems to have varied, but in the early sixteenth century was £20 to £50,[2] fixed at £40 on the appointment of Sir David Lindsay of the Mount.[3] Two chalders of oats were also allowed for Lyon's "hors corn,"[4] and the horse was also supplied by the Crown.[5] Lyon and each of the heralds received an official estate for life, apparently a "twenty merk land."[6] Collessie was that formerly assigned to Lyon, but eventually Luthrie in Fife became his recognised fief, and so remained until the Commonwealth.[7] In 1630 the salary was increased to £100 sterling,[8] in 1727 to £300, and in 1796 to £600. A recommendation in 1822 that the Lord Lyon's salary be £1000, and the Lyon Clerk's £400,[9] has never been carried out, and the present salaries are: Lord Lyon, £600; Lyon Clerk, £250.[10]

773. Amongst other privileges enjoyed by the officers of arms were immunity from rates and taxes, a privilege which has been enjoyed from the earliest times and, to a limited extent, to the present day. The officers of arms are "freed and exempt" from all manner of tax, stents, or impositions imposed by State or Parliament, both in person, lands, and goods, also from watchings, wardings, etc., in burghs where they dwell.[11] The privilege was sustained in a contested case against the City of Edinburgh, 28th November 1579,[12] and in 1631 was sustained against State taxation, as well as local stents.[13] A letter of gift, based on former usage, passed on 27th June 1633.[14] On 21st October 1663 a suspension was passed against the Lord Provost and Magistrates of Edinburgh.[15] The Act 1669, c. 95, gave the exemption statutory confirmation,[16] and the Act of 1867[17] preserves the privileges heretofore enjoyed by Lyon and his Court. At that date the exemption was still exercised, as it has since been, in regard to school and parish rates throughout Scotland, but

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[1] *Lyon* v. *Usher*, 1685, papers in Lyon Office; 1681, Privy Council, 3rd Series, vii. 163, 168, 170; Balfour's Heraldic Tracts, Appendix XVII. xxvii.

[2] Lord High Treasurer's Accounts, i. cxcvii; v. 160.

[3] Exchequer Rolls, xviii. 17.

[4] Privy Seal, xvi. fol. 61.

[5] Exchequer Rolls, v. 536.

[6] Exchequer Rolls, iii. 170, 191, 692.

[7] Account of the Office of Heraulds, 1661, p. 20; Exchequer Rolls, xviii. 7.

[8] Privy Seal, 102, fol. 125.

[9] Tenth Report of the Commissioners on Scottish Courts of Justice, p. 44.

[10] 30 Vict. c. 17, ss. 3 and 5.

[11] Nat. Lib. MS., 34-3-22.

[12] Privy Seal, iii. 241.

[13] Privy Seal, iv. 182.

[14] Privy Seal, 104, fol. 246.

[15] Original in Lyon Office.

[16] Acts, vii. 633.

[17] 30 & 31 Vict. c. 17, ss. 1 and 6.

Edinburgh has recently claimed that the privilege, so far as that city is concerned, was terminated by the Poor Law (Scotland) Act, 1845.[1]

SECTION 8.—DUTIES.

774. The duties of the Lord Lyon are both ministerial and judicial. They include:

1. Granting patents of new armorial bearings to such virtuous and well-deserving persons or corporations as apply to him, and upon whom he sees fit to confer arms.[2]

2. Granting supporters to persons entitled to them under Royal Warrant or otherwise, or upon whom, in virtue of his jurisdiction,[3] he sees fit to confer them. Such grants "fall entirely within the ambit of his ministerial powers," [4] and cannot be called in question.

3. Differencing the arms of cadets of families who have already recorded arms.

4. Confirming arms to the representatives of families and corporations who omitted to register them within the year and day of the statute 1672, c. 47.

5. Authorising alterations or additions to existing arms, and granting arms or augmentations in obedience to warrants from the Crown.

6. Granting, authorising rematriculation of, or varying the marshalling of arms in accordance with stipulations in deeds of entail or other settlements, or the wishes of petitioners, in so far as the law admits.

7. Granting certificates of change of name,[5] either surname or Christian name.[6]

8. Deciding on questions of family representation,[7] and claims to particular coats of arms. By the Act 1662, c. 53, Lyon was declared the only judge competent in pedigrees and "such cases and debates." For other reasons that statute was repealed by 1663, c. 15.

9. Recording pedigrees in the official Register of Genealogies after same have been proved before him judicially.

10. Conducting genealogical investigations and answering inquiries regarding points of genealogy, heraldry, and precedence.

11. Preparing funeral escutcheons, and certificates of pedigree or seize-quartiers, viz. birth briefs, for Scots going abroad or marrying foreigners, etc.

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[1] 8 & 9 Vict. c. 83, s. 50.

[2] 1672, c. 47: Acts, folio edition, viii. 95; *Macdonnell* v. *Macdonald*, 1826, 4 S. 371, per Lord Robertson.

[3] Heraldic Jurisdictions (case submitted for opinion of Law Officers of the Crown, 1906 and 1912), p. 46; Privy Council, 2nd Series, iv. 156; *Trotter*, 1826, Lyon Register, iii. 47.

[4] *Stewart-Mackenzie* v. *Fraser-Mackenzie*, 1922 S.C. (H.L.) 48, per Lord Shaw, and *ibid.*, 45, per Lord Dunedin.

[5] 30 & 31 Vict. c. 17, Schedule B.

[6] *Elphinstone of Glack*, 4th April 1928, Lyon Register, xxvii. fol. 79.

[7] *Darroch of Gourock*, 1797, "Old Note" Book, 49, Lyon Register, i. 575; *Chiefship of Clan Gunn*, 1800, "Old Note" Book, 75, Lyon Register, i. 583; *Captaincy and Chiefship of Clan Chattan*; G. Burnett, MSS. Account of Lyon Office, pp. 24-26; *Chiefship of Clan Allan*, Register of Genealogies, i. 229, Lyon Register, 1777, i. 515.

12. Conducting the execution of Royal Proclamations, State and public ceremonial of all descriptions in Scotland. In 1822 ceremonial prepared by Usher of the White Rod was cancelled, and fresh arrangements ordered to be prepared by Lyon and submitted under his signature—which was done.[1]

13. The marshalling of State processions, cavalcades, and solemnities,[2] and enforcing the warrant of precedence. Until 1910 Lyon investigated and determined questions of precedence, when the Court of Session found (with hesitation and "without evidence to foreclose the question") that his jurisdiction in precedency was ministerial only,[3] but this decision was based on the supposition that Lyon Court was a statutory tribunal "established by 1587, c. 30." [4] Later investigation, including the discovery of Forman's sixteenth-century Liber Curiarum, has quite confuted that supposition,[5] and it is thought that Lyon's jurisdiction in precedency would now be sustained.

14. Under the Royal Warrant, 11th February 1910, Lyon reports to the Home Office on all claims to baronetcies of Nova Scotia, or baronets whose domicile is Scottish, and it is remitted to him to take the evidence on such claims. Under the said Warrant Lyon keeps a register of the succession to such baronetcies.

15. Advising Government Departments regarding matters connected with Scots heraldry, genealogy or family representation, Crown vassals, public and Court ceremonial, and many other matters.

16. The appointment and control of messengers-at-arms, and trial of complaints against these officers.[6]

SECTION 9.—LYON CLERK.

775. The Lyon Clerk and Keeper of the Records in the Court of the Lord Lyon, now appointed by the Crown,[7] is responsible for—

1. Keeping the Public Register of All Arms and Bearings in Scotland (the Lyon Register), in which no entry can be made without Lyon's warrant.[8]

2. Matriculating in obedience to the Lord Lyon's warrants, in this Register, arms granted, confirmed, or differenced, and in the Public Register of Genealogies, pedigrees and birth brieves.

3. Issuing extracts from the registers, or making searches in these or in the other MSS. collections in the office.

4. Keeping and appending to appropriate documents the Seal of the Office.[9]

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[1] Lyon Office Precedency Book, 10th August 1822. [2] *Ibid.*, 12th September 1815.

[3] *Royal College of Surgeons* v. *Royal College of Physicians*, 1911 S.C. 1054, at p. 1059.

[4] 1911 S.C. 1061, per Lord Johnston.

[5] "Liber curiarum et processus honorabilis viri Dni Roberti Forman de Luthrie Militis Leonis Regis Armorum," 1557 (Register House); *Macrae's Trs.* v. *Lord Lyon*, 1926, S.N. 91.

[6] See MESSENGERS-AT-ARMS. [7] 1867, c. 17, s. 3.

[8] Regulations, Art. III., drawn up by Lord Colstoun, 1762, for guidance of Lord Lyon Hook-Campbell, Lyon Office Records.

[9] Interlocutor, Lord Bannatyne, 15th February 1805, *Home* v. *Boswell*; Receipt of even date, "Old Note" Book, p. 74.

5. Preparing letters patent, certificates, and other writs in obedience to Lyon's warrants.

6. Keeping the Court books and other accounts of the Lyon Court, and controlling the Library and MSS. collections of the Lyon office.

7. Keeping the Roll of Messengers-of-Arms, and issuing Admissions to these officers.

SECTION 10.—THE LYON COURT.

SUBSECTION (1).—*Customary Jurisdiction.*

776. The Court of the Lord Lyon is one of the most ancient judicatures in the country, and in addition to being a court of the realm, from which appeal lies through the Court of Session to the House of Lords,[1] is, in regard to armorial bearings, also to a certain extent a legislature, in which the laws of arms may be defined, the heralds having voice and vote, the pursuivants voice only.[2] The Lord Lyon's jurisdiction is "ane free regalitie." [3] It includes two distinct branches: Jurisdiction, (*a*) over armorial bearings and over the higher officers of Arms, (*b*) over messengers-at-arms.[4]

777. The Lyon Court is a jurisdiction of pre-statutory origin and founded on ancient custom.[5] The Lord Lyon is one of the "Judges Ordinary" of Scotland [6] "as . . . juges and ministers of law to quha tha actions pertenis and effeirs." [7] In 1514, in proceedings against Lord Drummond for treason committed in striking the Lyon, the Lord Lyon "protested for his jurisdiction," which he held extended to cases of treason,[8] whilst in 1526 there is ratification of an ordinance made by Lyon and his Court at the command of the King.[9] On 8th May 1554 the Lyon Clerk intimates replegiation of a case to the Court of "ye richt honorabill lyon king of arms, as is competent judge in all actions concerning his office . . . and in ye execution of office yr is nae oyer juge compotentyis." [10] The earliest extant recorded Lyon Court action regarding a coat of arms is *Burnet of Burnetland* v. *Burnet of Leys*,[11] *circa* 1546, but Lyon's jurisdiction over arms existed prior to 1503.[12] In the sixteenth century Lyon exercised a jurisdiction in debt, and pronounced decrees for poinding, and granted warrants for execution by the officers of arms.[13]

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[1] *Stewart-Mackenzie* v. *Fraser-Mackenzie*, 1922 S.C. (H.L.) 39.

[2] Heraldry in Scotland, ii. 449; Privy Council, 2nd Series, iii. 595.

[3] Account of the Office of Heraulds, Nat. Lib. MSS., 34–3–22, p. 33; also Wyllie Collections, Lyon Office, p. 33.

[4] See MESSENGERS-AT-ARMS.

[5] *Lord Lyon* v. *Copland and M'Coll*, 1766, Mor. 7654; and Information for the Lord Lyon *in causa*, p. 15, Lyon Office Records; *Macrae's Trs.* v. *Lord Lyon*, 1926, S.N. 91, per Lord Constable.

[6] 1578, Privy Council, 1st Series, iii. 24.

[7] 1487, c. 10; Acts, ii. 177.

[8] *Acta Dominorum Concilii et Cessionis*; information from Prof. R. K. Hannay.

[9] Acts, ii. 317.

[10] Burgh Court Books of Haddington, Riddell MSS., vol. li., Signet Library.

[11] Sir George Mackenzie, Works, ii. 632.

[12] Lord Lyon George Burnett, MSS. Account, p. 3.

[13] *Sawer* v. *Carrick*, 29th February 1558–9; Liber Curiarum et Processus, Sir Robert Forman of Luthrie, fol. 1; *Ross* v. *Unicorn*, 5th July 1560, *ibid.*; *Dickson* v. *Lawson*, 22nd November 1560, *ibid.*; *Auchinbathie* v. *Scrymgeour*, 31st January 1561, *ibid.*, fol. 7.

SUBSECTION (2).—*Constitution.*

778. The Lyon Court formerly consisted of the Lord Lyon, six heralds, and six pursuivants. They are members of the Royal Household, H.M. "familiar and daily servitors" [1] (not "civil servants" nor governed by the rules of that service), and wear beneath their tabards a special variety of the household uniform. The heralds were usually named Islay, Rothesay, Marchmont, Albany, Ross, and Snowdon; and the pursuivants, Kintyre, Dingwall, Carrick, Bute, Ormond, and Unicorn. By the Act of 1867 [2] the number of heralds was reduced to three, the present heralds being Albany, Rothesay, and Marchmont. They are appointed by the Lord Lyon, hold office *ad vitam aut culpam titulo oneroso*,[3] and receive salaries of £25 per annum. The Lyon Office fees and fees of honour, which they enjoyed prior to the Act of 1867, were thereby transferred to the Treasury, but the Act confirms the other ancient rights and privileges.

779. Pursuivant, Pursuivant-at-Arms, or Pursuivant-of-Arms is the title of the third rank of officer of arms. Writers are not agreed whether originally the term meant a follower or attendant on a herald, or a follower (or learner) of armory. In any case the pursuivant, while frequently still acting as a subordinate, under the orders of a superior officer of arms, has been held from a very early period to be an officer who may on occasions be competently employed to act independently. In former times the greater barons were accustomed to have their own officers of arms, sometimes styled heralds, but more often pursuivants. Before the Union the King's officers of arms were bound to be in attendance on the Parliament [4] during its sittings, and were then in constant employment by it, as at all times by the Privy Council, as well as by the King, as messengers-of-arms on matters of importance and responsibility, as well as for making public proclamations of Acts of the King, Council, and Parliament. They also took part in the riding of the Parliament, and officiated at coronations and other royal ceremonies. By the Act of 1867 their rights and duties are essentially left unaltered, but their number is reduced from six to three. They, like the other officers of arms in Scotland, now receive no Lyon Office fees, but are each entitled to a salary of £16, 13s. 4d. per annum, and would be entitled to various ancient remunerations if employed by the Crown on service or otherwise. They would also require to be paid the ordinary charges if employed in the capacity of messengers-of-arms—for which they are competent but not now in use to be employed. The titles at present in commission are Unicorn, Carrick, and Falkland. Two "Pursuivants Extraordinary" may be created by Lyon when additional officers of arms are necessary,[1] but they are not part of the establishment and would receive no salaries.

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[1] Liber Curiarum et Processus, fol. 1.

[2] 30 Vict. c. 17.

[3] Privy Council, 2nd Series, iv. 271.

[4] Acts, iii. 420.

780. The Lord Lyon also appoints the Procurator-Fiscal of the Lyon Court, the Macer of the Lyon Court, and such herald painters and writers as are from time to time required to execute the business of the office. The six State trumpeters are also attached to the Lyon Office, and are at the disposal of the Lord Lyon or his officers when required. The Court of the Lord Lyon is situated in the central suite of H.M. Register House, Edinburgh,[2] and includes, in addition to the official records, an extensive library relating to Scots heraldry and genealogy. The Lord Lyon may, however, hold his Court anywhere in Scotland,[3] and even in a private house.[4]

SUBSECTION (3).—*Procedure.*

781. Procedure in Lyon Court is judicial both in nature and form. It is usually invoked by petition, and the Procurator-Fiscal of the Lyon Court represents the interests of the Lyon and the Treasury and prosecutes offenders. The practice conforms to that of the old Courts of Regality, and to that of the Court of Session. Counsel may be employed and expenses allowed.[5] On 3rd June 1561 a petition by Catherine Forbes for matriculation of arms was dealt with judicially, and essentially on the same lines as a similar petition at the present day.[6] In 1637 an action for removal of arms was not entertained by the Privy Council, but was remitted to the "Judge Ordinary," [7] viz. Lyon.

SUBSECTION (4).—*Statutory Jurisdiction.*

782. Statute has on several occasions intervened to define and augment the common law and regality jurisdiction of the Lyon Court. The first extant statute is 1592, c. 125,[8] but this specifically refers to previous "Acts" in regard to armorial bearings. The preamble narrates that certain heraldic abuses have arisen amongst the lieges; that these are a cause of confusion; and, accordingly, makes provision for restraining fraud and increasing security in armorial property. The statute gives Lyon and his "brither herauldis" (*alias* deputes) [9] power to "visit" the whole arms of noblemen, barons, and gentlemen, and to difference them and matriculate them in their books and registers, and to prohibit all common people "nocht worthie be the law of armes" from bearing "ony signes armorialles." "Visitation," in the laws of arms, means "examine and reform," and confers most ample rights—after due warning—to enter premises, and to summarily correct, by deletion, etc., any arms found.[1] The statute recognises the existence of previous Acts of Parliament against the bearers of false arms, but of these previous statutes no trace now exists, and their import can only be determined from the practice of the Lyon Court and jurisdiction.[2]

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[1] Privy Council, i. 658; and 30 Vict. c. 17, s. 1.

[2] 30 Vict. c. 17, s. 10.

[3] Privy Council, 1st Series, iii. 512.

[4] *Messengers* v. *The Lyon*, 1631, Mor. 7648.

[5] *Stewart-Mackenzie* v. *Fraser-Mackenzie*, 1922 S.C. (H.L.) 39; *Macrae's Trs.* v. *Lord Lyon*, 1926, S.N. 91.

[6] Liber Curiarum et Processus, fol. 27; Antiquities of the Shires of Aberdeen and Banff, Spalding Club, iii. 502.

[7] *Lord Fraser* v. *Fraser of Philorth*, Privy Council, 2nd Series, vi. 392.

[8] Folio Acts, iii. 554.

[9] Per 1672, c. 47, narration of 1592, c. 125, and not to be confused with "the Lyon Depute."

783. Owing to the loss of the existing registers during the Civil Wars, Parliament, by the Act 1672, c. 47, instituted the "Public Register of All Arms and Bearings in Scotland," and ordained Proclamation to be made, requiring everyone to lodge particulars of what arms they used, within a year and day, in order that Lyon might adject such differences as he found necessary, and matriculate them in the new Public Register. The statute, like Sir James Balfour's Commission of 1630, ratified by an Act of Council,[3] covers not only arms but "signes," the intention being to bring within Lyon's jurisdiction not merely armorial bearings but devices which are colourable imitations of coats of arms, and to prevent disputes as to what is a badge and what is a coat of arms. Registration within a year and day was made gratuitously, but to prevent confusion in the compilation of evidence, or accidental omission from the register, "receipts" were given, which are declared evidence of having obtempered the statute.

784. There are only three ways of proving that arms have been matriculated in Lyon Register: (1) An entry in the register itself; (2) An extract from the register; (3) A statutory receipt, *e.g.* Royal Burgh of Elgin, 28th November 1888,[4] entered in terms of a "receipt" of 9th October 1678. The arms thus registered descend to the heirs of the person in whose name they are registered, according to the laws of arms. (See HERALDRY.[5]) The register is ordained to be the "True and Unrepealable Rule of All Arms and Bearings in Scotland," to remain in the Lyon Office, and to be one of the Public Registers of the Kingdom for this particular form of incorporeal heritable property. The term "unrepealable" does not mean that entries in the register are not open to review.[6] The real meaning appears to be that Lyon, having finally differenced a coat of arms and matriculated it in terms of the statute, thereby terminates his own power of further altering these arms under his prerogative, and that the heir for the time being, and the person for whom it is matriculated, is entitled to bear it without further alterations.

785. In terms of the statute, all cadets require to apply for matriculation, with such congruent difference as the Lord Lyon may assign. "Whosoever shall use any other arms any manner of way" than those matriculated for him in the Lyon Register is, after expiry of the year and day, liable to a fine of £100 Scots, payable to Lyon under the statute, but now to the Treasury under 1867, c. 17,[1] and to escheat to His Majesty all moveable goods and gear upon which the unwarrantable arms are engraven or otherwise represented. The "whosoever" clause includes the Crown and members of the Royal Family[2] and corporations and their officials,[3] for which a special section of the register was assigned on its foundation in 1672, and which were included under the *contemporanea expositio* of the Act. Burgh Arms had already been subject to Lyon's jurisdiction,[4] and matriculation was advised, as a precaution against loss of burghal rights, by the Convention of Burghs in 1673, and again in July 1676.[5]

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[1] Boutell's Heraldry, p. 343; *Macrae's Trs.* v. *Lord Lyon*, 1926, S.N. 91, per Lord Constable; Privy Council, 2nd Series, iii. 555.

[2] *Macrae's Trs.* v. *Lord Lyon*, *supra*.

[3] Privy Council, 2nd Series, iii. 156, 157, 555, 594.

[4] Lyon Register, i. 461.

[5] Vol. VII. p. 552, *ante*.

[6] *Dundas* v. *Dundas*, 1762, 5 Bro. Supp. 493; *Macdonnell* v. *Macdonald*, 1826, 4 S. 371; *Cuninghame* v. *Cunyngham*, 1849, 11 D. 1139; *Hunter* v. *Weston*, 1882, 9 R. 492; *Stewart-Mackenzie* v. *Fraser-Mackenzie*, 1922 S.C. (H.L.) 39.

786. The provision against use does not strike at those who possess but do not use. Consequently, existing armorial rights were not forfeited by the statute.[6] Such unregistered arms are, however, still liable to be differenced as Lyon may consider necessary when they come to be matriculated, and those who omit to record their right are liable to lose it if the arms to which they might have been entitled are granted or confirmed to somebody else. The original owner would merely be entitled to some differenced version. Thus Dundas of that Ilk nearly lost his right to the undifferenced Dundas arms, had the registration by Dundas of Fingask not been obtained by *obreption*, and called in question timeously. A Lyon Court decree (which includes all grants and matriculations of arms) cannot be reduced after forty years.[7]

SUBSECTION (5).—*Names and Signatures.*

787. The statute, 1672, c. 47, also gives Lyon and the heralds certain duties for enforcing observance of regulations regarding signatures in Scotland, and the Lord Lyon has jurisdiction in matters of name and change of name.[8] See NAME AND CHANGE OF NAME.

SECTION 11.—APPEALS FROM LYON COURT.

788. The Lyon Court being a regality, there was formerly no appeal, and the only competent form of revision would have been by "falsing of doom" in Parliament.[9] That Lyon Court was regarded as a sovereign judicature in which no other judge was competent appears from a case in 1554,[1] and in 1661 Lyon was still regarded as a "sovereign judge."[2] On 8th June 1630 the Privy Council, in confirming the patent of Sir James Balfour of Kinnaird as Lord Lyon, provided that appeal to the Privy Council should be competent,[3] and the extraordinary jurisdiction of the Scots Privy Council is deemed to have passed in 1717 to the Inner House of the Court of Session.[4] Although neither pursuer nor defender in *Dundas* v. *Dundas* quoted this Act of Council, it is significant that this first advocation from Lyon Court to the Court of Session was based on that Court "coming in place of" the Scots Privy Council.[5] The Court of Session has since then sustained its jurisdiction to review proceedings in the Court of the Lord Lyon,[6] and from the Court of Session appeal may be taken to the House of Lords.[7] In the case of *Hunter* v. *Weston*[8] the Lord President said that it must be taken for granted that Lyon knows more about coats of arms than any other person, and that by his judgment or authority anyone who bears a coat armorial is bound; that the decision by Lyon regarding a coat of arms cannot be raised as a side issue in another court without having first had recourse to regular proceedings by which Lyon's decision can be reviewed; and that any person having a proper interest is entitled to be heard upon the merits of Lyon's judgment.

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[1] *Macrae's Trs.* v. *Lord Lyon*, 1926, S.N. 91.

[2] Lyon Register, i. 14, 16, 18, 20 (H.M. Charles II.), and 26 (H.R.H. Duke of Albany and York).

[3] Compare *Taylor* v. *Renfrewshire Education Authority*, 1920 J.C. 95.

[4] City of Aberdeen, 1637, Miscellany of the Spalding Club, v. 151 ; Stevenson, Heraldry in Scotland, p. 93.

[5] J. D. Marwick, Records of the Convention of Royal Burghs, ii. 635, 665.

[6] Heraldry in Scotland, p. 67 ; *Dundas* v. *Dundas*, 1762, 5 Bro. Supp. 493.

[7] *Stewart-Mackenzie* v. *Fraser-Mackenzie*, 1922 S.C. (H.L.) 39, at p. 45, per Lord Shaw.

[8] Lorimer, Handbook of the Law of Scotland, 1854 edition, p. 445 ; 30 & 31 Vict. c. 17, Schedule B ; Heraldry in Scotland, p. 386.

[9] Acts, i. 525, S.H.R. xxiv. 4.

789. The Lord Lyon being formerly a sovereign judge is, like the Lord Admiral, entitled to reduce his own decrees.[9] The Court of Session will not review proceedings of Lyon in so far as they are ministerial,[10] or entertain an action of reduction at the instance of a party who does not claim the arms for himself.[11] "The power of granting Ensigns Armorial is part of the Royal Prerogative, but everything belonging to that power has been given by sundry statutes to the Lord Lyon. His power to grant new armorial bearings is merely ministerial and discretionary, and with that this Court cannot interfere, but if the Lord Lyon should grant to one person the arms which another is entitled to wear" (this necessarily means arms to which such person is entitled under an existing grant or matriculation), "and should refuse to give redress" (by reducing his own decree),[12] "there could be no doubt of the jurisdiction of this court to entertain an action at the instance of the party, to have his rights declared, as this would involve a question of property, which a right to bear particular ensigns undoubtedly is."[1]

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[1] 8th May 1554, Riddell's MSS., Signet Library, vol. li.

[2] Account of the Office of Heraulds, fol. 32.

[3] Privy Council, 2nd Series, iii. 555.

[4] Ersk. i. 3, 9.

[5] *Dundas* v. *Dundas*, 1762, papers in Lyon Office.

[6] *Macdonnell* v. *Macdonald*, 1826, 4 S. 371; *Cuninghame* v. *Cunyngham*, 1849, 11 D. 1139.

[7] *Stewart-Mackenzie* v. *Fraser-Mackenzie*, 1922 S.C. (H.L.) 39.

[8] 1882, 9 R. 498.

[9] *Dundas* v. *Dundas*, 28th February 1757, papers in Lyon Court, and Interlocutor 20th December 1756, Lyon Court Books; *Alexander Gordon*, 3rd December 1813, Lyon Register, ii. 104; *Adams of St. Bennetts Castle*, 24th December 1923, Lyon Register, xviii. fol. 57.

[10] *Cuninghame* v. *Cunyngham*, 1849, 11 D. 1139; *Royal College of Surgeons* v. *Royal College of Physicians*, 1911 S.C. 1059; *Stewart-Mackenzie* v. *Fraser-Mackenzie*, per Lord Dunedin, 1922 S.C. 44.

[11] *Macdonnell* v. *Macdonald*, *supra*; *Stewart-Mackenzie* v. *Fraser-Mackenzie*, *supra*.

[12] *Dundas* v. *Dundas*, *supra*.

Section 12.—Enforcement of Decrees.

790. From the earliest times, and with a view to preventing confusion in battle, or fraud in civil affairs, the officers of arms have had power summarily to remove or delete unwarrantable arms,[2] and all who bear arms are obliged to obey the Lyon's orders.[3] In Scotland the Lord Lyon has been in use to erase and delete all irregular arms.[4] In consequence of 1672, c. 47, unregistered arms in any form, or registered arms unwarrantably attributed to persons to whom they do not belong, are liable to deletion.[5] Whilst summary removal is thus competent when executed by one of the officers of arms, the normal practice is to act after informal request for removal or judicial proceedings. The latter are raised at the instance of the Procurator-Fiscal of the Lyon Court, the summons, or "Lyon Precept," running in the name of the Lord Lyon as King-of-Arms, and concluding for the statutory fine, escheat of moveables, expenses, and, if necessary, imprisonment of the contravener. If necessary, the matriculation may include a warrant for arrestment on the dependence, in order to prevent the Crown's title to the escheated goods being defeated by removal of the unwarrantable arms during the process.[6] The decree was formerly endorsed on the precept.[7]

791. Decrees of the Lyon Court are immediately extractable, and may be forthwith executed by the officers of arms, and the respondent cannot be reponed after extract.[8] Where escheat or arrestment is to be executed, Lyon's warrant is granted in the usual manner to messengers-of-arms,[9] but "visitation," including erasure, can be executed only by the Lord Lyon in person, or his duly appointed deputies.[10] The practice is for Lyon to grant warrant to a herald and pursuivant to make the visitation and erasure.[11]

792. The Lord Lyon can grant warrants to messengers-of-arms to poind upon his own decrees.[12] "Siclike letters" as are in use to pass on the decrees of other judges ordinary are ordained to pass on Lyon decrees by the Act, 1587, c. 30,[1] and either in consequence of prior custom, or of this statute, Lyon "has letters of horning against any private persons usurping armorial bearings without his tolerance." [2] Letters of horning on Lyon decrees were, however, not specifically authorised by the Act, 1606, c. 9, and apparently this caused doubt as to their competency as regards Lyon's jurisdiction over messengers, and they were accordingly authorised by the Act, 1644, c. 276, but this statute fell under the General Act Rescissory.[3] By the Act, 1669, c. 95, letters of horning on six days' charge only are to be "direct upon the said Acts,[4] upon the instance of the Lyon, for putting the said Acts and all the branches thereof to further and better execution," [5] and the Lord Lyon has been in use to ordain letters of horning to pass, if necessary, for enforcing all decrees for penalties and expenses pronounced in the course of his armorial jurisdiction, and as the Act, 1672, c. 47, is "for the more vigorous prosecution" of the Act, 1592, c. 125, the letters of horning authorised by the Act, 1669, c. 95, are equally available for enforcement of the Act, 1672, c. 47.[6]

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[1] *Macdonnell* v. *Macdonald, supra,* per Lord Robertson.

[2] Herald and Genealogist, ii. 153, 154; Nat. Lib. MS., 34–3–22, p. 40; H. Nicolas, History of the Earldom of Strathearn, App. 4, p. 342.

[3] 1672, c. 74.

[4] Mackenzie, Works, ii. 582.

[5] *Macrae's Trs.* v. *Lord Lyon,* 1926, S.N. 91.

[6] Stevenson, Heraldry in Scotland, p. 93, note 3.

[7] *Procurator-Fiscal of the Lyon Court* v. *Earl and Countess of Wemyss,* 17th August 1732, Lyon Court Decrees.

[8] *Dickson* v. *Lawson,* 22nd November 1560, Liber Curiarum et Processus, Register House; *Fiscal* v. *Campbell of Shawfield,* 31st December 1729, Lyon Court.

[9] *Fiscal* v. *Wood,* 10th June 1773, Lyon Court Records.

[10] Act 1672, c. 47.

[11] Nat. Lib. MS., 34–3–22; *Fiscal* v. *Campbell of Shawfield,* 31st December 1729, Lyon Court; *Fiscal* v. *Lockhart of Carnwath,* 6th January 1732, Lyon Court Book, when an escutcheon in Niddry Wynd was pulled down.

[12] *Sawer* v. *Forrester,* 29th February 1557–9; *Ross* v. *Harvey,* 5th July 1560; *Dickson* v. *Lawson,* 22nd November 1560, Lyon Court; Liber Curiarum et Processus, Sir Robert Forman of Luthrie, Register House.

793. Where a respondent averred that his predecessors had obtempered the statute, but no matriculation was extant, it was found competent to charge him to matriculate, "matriculation being requisite in every case." [7] Since 1867 penalties under the Acts of 1592 and 1672 have become payable to the Crown and are regarded as analogous to penalties under the Inland Revenue Acts,[8] and, being for behalf of the revenue, are subjects on which general letters of horning [9] can still be raised if necessary, as they fall under the exceptions of 2 William and Mary, c. 13. Horning would still be the effective mode of enforcing the execution of a Lyon decree *ad factum præstandum*, *e.g.* an order to delete arms at such a distance that it would be inconvenient to ordain them to be removed or escheated by officers of arms,[10] and the expenses of the horning would be exigible.[11]

794. Nowadays the mere recovery of the fine and expenses could probably be most expeditiously effected by raising a small debt summons upon the extract decree in any convenient Small Debt Court,—a practice which has been indicated for the recovery of heritors' assessments.[12] Where imprisonment is necessary, the Lord Lyon grants warrant for incarceration, directed to the most convenient magistrate.[1] In 1669 a caption followed on a Lyon Court decree.[2]

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[1] Acts, iii. 449.

[2] Account of the Office of Heraulds, 1661, pp. 23, 24.

[3] 1661, c. 6.

[4] 1587, c. 30, and 1592, c. 29.

[5] Acts, folio edition, vii. 633.

[6] *Fiscal* v. *Campbell of Shawfield*, 31st December 1729; *Fiscal* v. *Wood*, 8th January 1773, Lyon Court.

[7] *Fiscal* v. *Murray of Touchadam*, 5 Bro. Supp. 490.

[8] Per Lord Constable in *Macrae's Trs.* v. *Lord Lyon*, 1926, S.N. 91.

[9] Bill of Horning passed upon Acts 1592 and 1672, 4th June 1675, Lyon Office Records.

[10] *Macrae's Trs.* v. *Lord Lyon*, *supra*, where such a decree was found competent, but the mode of its execution was not argued before the Lord Ordinary.

[11] 1 & 2 Vict. c. 114, s. 8.

[12] *Heritors of Ellon*, Aberdeen Press and Journal, 25th November 1926, p. 4.

795. Enforcement of the laws of arms, both by summary and judicial procedure, has continued uninterruptedly to the present day. An action calling in question Lyon's jurisdiction to pronounce a decree ordering the removal of arms from a tombstone, and incidentally to delete or otherwise deal with arms depicted on heritable property, was found incompetent, and it was observed by Lord Constable that Lyon has such jurisdiction.[3] There is hardly a great public building in Scotland from which arms have not from time to time been deleted, *e.g.* the MacEwan Hall, Glasgow Cathedral, 1862, and in 1927 the Scottish War Memorial, when the Government endorsed Lyon's proceedings anent unwarrantable arms of sundry burghs and county councils.[4] The early statutes [5] continue to regulate Lyon's jurisdiction, which is expressly reserved by Article 19 of the Treaty of Union. The statute of 1867 reorganised the financial arrangements of the office, making all fees payable to the Treasury instead of, as formerly, to Lyon and the heralds.[6] The office now covers its salaries and expenses, and annually yields a substantial profit to the Treasury. The offices of Lyon-Depute and Lyon-Clerk-Depute were abolished in 1867,[7] but the jurisdiction and such "Rights, Duties, Powers, Privileges, and Dignities as have heretofore belonged" to the office are given the statutory sanction of the Imperial Parliament.[8]

SECTION 13.—ARMORIAL LICENCE DUTY.

796. This Excise duty was imposed by the Revenue Act, 1869,[9] and provides that anyone who shall wear or use armorial bearings shall pay two guineas per annum if used upon a carriage, or one guinea per annum if used otherwise. A coat of arms is defined to be "Any armorial bearing or crest or ensign," whether recorded at the College of Arms or not.[10] This definition refers to English conditions. In Scotland there is no College of Arms, and all Scots armorial bearings fall under the description, "Not registered at the College of Arms." However, it renders any person who uses "unwarrantable" arms in Scotland liable for Licence Duty, in addition to the statutory penalties incurred under the Acts 1592, c. 125, and 1672, c. 47. The exemptions include any member of the Royal Family, or any person who shall by right of office wear or use any arms or insignia of any member of the Royal Family, or of any corporation or royal burgh.[1] In Scotland the "arms of a corporation or royal burgh" can only mean the arms lawfully assigned to such corporation or royal burgh, and ascertainable from the Public Register of All Arms and Bearings. The arms of some local magnate, or bogus arms, are not in Scots Law the "arms of any corporation." In England it has been held (overruling a departmental interpretation of 9th March 1894) [2] that "corporation" means only a municipal corporation,[3] and that other corporations are liable.

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[1] Warrants for Incarceration, directed to Sheriff of Lanark (12th March 1683); Sheriff of Wigton (18th July 1633); and to Magistrates of Edinburgh (19th July 1733); Condescendence to Information for the Lord Lyon, p. 30, in *Lord Lyon* v. *Copeland and M'Coll*, 12th June 1765, Lyon Office Library.

[2] *Stacie* v. *Tailzefear*; Kings and Nobilitys Arms, ii. 54, Lyon Office.

[3] *Macrae's Trs.* v. *Lord Lyon*, 1926 S.N. 91.

[4] Hansard, 28th June 1927.

[5] 1592, c. 125; 1669, c. 95; 1672, c. 47 and c. 74; Acts, folio edition, iii. 554; vii. 633; viii. 95, 123.

[6] 30 Vict. c. 17, ss. 3, 5, and 8.

[7] *Ibid.*, ss. 2 and 5.

[8] *Ibid.*, s. 1.

[9] 32 & 33 Vict. c. 14, s. 18.

[10] *Ibid.*, s. 19, subs. 13.

797. The statute is not explicit regarding what constitutes "use" within the meaning of the Act, but subs. 14 states that anyone who keeps a carriage with arms on it is deemed to wear and use any such arms painted thereon—even the arms of somebody else. The term "carriage" now includes motor-car, but the term "keep" now means use, and does not cover a carriage kept but not used. Otherwise there is no enactment, and little case-law, upon the subject of "use." Assessed tax cases [4] are not admitted as authority,[5] and usually display complete ignorance of heraldic law. The term "wear" is clear, and any person outwith the exempted categories who affixes to his person any crest or armorial bearings becomes liable. A signet ring having a lion upon a shield, surmounted of a crown, was held to be an armorial bearing.[6] "Even if the person making use of the sign was not entitled to it, still if it was used by that person as an armorial bearing that would be sufficient to subject it to duty." [7] The use complained of was also a statutory offence in Lyon Court. A member of the Royal College of Surgeons in England was (in a stated case reversing a Metropolitan Police Magistrate's judgment) found liable for using the college arms on his notepaper,[8] on the ground [9] that there was nothing to say whose arms they were, unless to a person knowing the arms; but in England there is no Public Register of Arms, and in Scotland a contrary decision might be anticipated, as the law and practice of heraldry is fundamentally different. If the arms had been surrounded by the college name no question could have arisen. The licencing authorities, at the instance of the Lord Lyon (communicated to the Scottish Command), withdrew a claim made against an officer on whose notepaper appeared the badge of the regiment in which he was commissioned,[10] and Lyon should be applied to in cases of difficulty.

798. In many cases what constitutes "use" must be a matter of fact. Reference may be made to the terms of a Lyon Precept where the normal charge is "usurp and assume unto himself," and it would seem that what the Revenue Act strikes at is the use of arms by a person who assumes them unto himself.[1] The following may be some guide: Arms depicted upon a portrait to identify the subject, or impaled arms shewing that some piece of furniture or plate belonged to a certain married couple, or on a house, to indicate its builders, are palpably not being "used" (*i.e.* "assumed unto themselves") by persons happening to be the present owners; and a person who has inherited a house, or a variety of plate, with the arms of different donors or deceased persons upon it, may "use" the plate without "using" (*i.e.* assuming) the arms. On the other hand, since arms on moveables give a *prima facie* presumption of possession,[2] it may be that possession of such goods entitles the revenue authorities to infer a presumption that the arms are the applicant's, and consequently "in use," unless the contrary shall appear, *e.g.* if the arms are obviously those of somebody else. Thus a commoner could not be presumed to be using the arms on a piece of plate shewing a peer's arms, or a bachelor be presumed to be bearing an impaled coat of arms indicating a married man, or a male presumed to be bearing arms on a lozenge, which indicate a female. Where a person has arms of his own, recorded in Lyon Register, it would also seem difficult to assume that he was "using" any other arms which happen to be displayed on articles in his possession, unless the circumstances were such as to justify a prosecution in Lyon Court. Registration of arms in Lyon Register, or taking out a grant of arms, merely constitutes a "right to use," and is not *per se* "use" within the meaning of the Licensing Act, nor is the display of the patent, or extract, which is merely the document testifying the existence of a legal right to "use" the arms.

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[1] 1869 Act, s. 19 (1).

[2] A. C. Fox-Davies, Armorial Families, 1929 edition, xxxi.

[3] *Worshipful Company of Plumbers* v. *London County Council*, 1913, 77 J.P. 302.

[4] 48 Geo. III. c. 55.

[5] *Jepson* v. *Gribble*, 1876, 1 Ex. D. 151; Highman and Dennis, The Excise Law, ii. 56.

[6] *Milligan* v. *Cowan*, 1896, 23 R. 731.

[7] *Ibid.*, per Lord M'Laren at p. 732.

[8] *London County Council* v. *Kirk*, [1912] 1 K.B. 345.

[9] Per Lord Alverstone, at p. 350.

[10] Lyon Office Letter File, 1926, *s.v.* Scottish Command.

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[1] For a distinction between "use" and "record," see A. C. Fox-Davies, Complete Guide to Heraldry, p. 536.

[2] Mackenzie, Works, ii. 577, s. 17.

MACER.

See COURT OF SESSION; JUSTICIARY, HIGH COURT OF.

MACHINERY.

See FIXTURES; COAL MINES REGULATION ACTS; VALUATION AND RATING.

MAGISTRATE.

See BURGH; CRIME (PROCEDURE); JUSTICE OF THE PEACE.

MAILLS AND DUTIES.

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SECTION 1.—INTRODUCTORY.

799. "Maills and duties" is an old term meaning rents. "Maills," being the name of a coin at one time current in Britain, meant money payments, while duties meant personal services, such as carriages.[1] The term maills and duties is now seldom met with except in the expressions: (1) Action of maills and duties; (2) Assignation of maills and duties; (3) Prescription of maills and duties.

SECTION 2.—ACTION OF MAILLS AND DUTIES.

SUBSECTION (1).—*Title to Sue.*

800. Any action to enforce payment of rents was formerly called an action of maills and duties. The action was accordingly competent to anyone entitled either to be in possession of the land or to enter into possession of it. In the old view of the action a distinction was drawn between the petitory form and the possessory form. The petitory form was competent only where the pursuer had a valid title to the rents preferable to that of any competitor, and in this form of the action not only the natural possessors (tenants) but the civil possessors had to be called as defenders. The possessory form of the action, on the other hand, was adopted where the pursuers had been in civil possession of the lands for seven years, either as proprietor or on a title short of property, and in this case the tenants alone had to be called.[2] This distinction seems now to be of less importance, since the action of maills and duties, as now understood, is considered unnecessary and incompetent to a proprietor who is in civil possession of the land, and therefore the action will usually be in the petitory form, though the possessory action will still be available to a possessor for seven years whose title is insufficient to support a petitory action.

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[1] Ross, Lect. ii. 235.

[2] Stair, iv. 22, 14; Ersk. iv. i. 49; Rankine on Leases (3rd ed.), p. 360.

801. The following classes of persons might be pursuers in an action of maills and duties:[1] (1) Proprietors infeft; (2) disponees uninfeft, or mere assignees of the rents;[2] (3) liferenters by constitution or by reservation; (4) widowers in right of courtesy, or widows in right of terce, the title of the latter being sufficiently established by production of the service without an instrument of kenning;[3] (5) trustees, voluntary or judicial; (6) heirs in heritage, even for rents falling under the executry;[4] (7) apprisers or adjudgers;[5] (8) heritable creditors. The pursuer did not require to be infeft.[6] A superior or his assignee, as, for example, under a bond and disposition in security, has no title to raise the action for the recovery of feu-duties or casualties, the reason being that the infeftment of the vassal excludes him from possession;[7] nor can the holder of a reserved burden over the land use the action for enforcing his rights, because he has no title of possession.[8]

802. In modern practice the action of maills and duties is competent only to a heritable creditor who, having a security title to the rents, seeks to enforce his right to exact from the tenants payment of their rents as against the proprietor or civil possessor of the ground, to whom the tenants would, apart from the decree, pay the rents. In *Scottish Heritable Security Co.* v. *Allan Campbell & Co.*,[9] Lord President Inglis said: "It is only an incumbrancer that requires to use a process of maills and duties in order to give him a title, in a question with the tenant, to uplift the rents." A proprietor or a creditor with an *ex facie* absolute title cannot raise such an action,[9] nor have creditors already in possession a title to do so.[10] In such cases the appropriate remedy is an ordinary petitory action against the tenant.[11] This action would at one time have been understood to be included among actions of maills and duties; but the term has now the narrower signification above explained. Further, the creditor must hold an assignation of the rents, express or implied, along with his disposition in security of the property.[12]

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[1] See Stair, iv. 22, 7 to 9 ; Ersk. iv. 1, 49 ; Rankine on Leases (3rd ed.), p. 361.

[2] Bell's Com. (3rd ed.), i. 793.

[3] Fraser, Husband and Wife (2nd ed.), ii. 1105 ; *A.* v. *B.*, 1632, Mor. 15842.

[4] *Lawson* v. *Ogilvy*, 1832, 10 S. 531, affd. 1834, 7 W. & S. 393 ; *Lennox* v. *Reid*, 1893, 21 R. 77.

[5] *Scot* v. *Tenants of Whitslaid*, 1628, Mor. 207 ; *Moncrieff* v. *Lord of Balnagown*, 1629, 1 Bro. Supp. 378 ; *Belshes* v. *Tenants of Loudoun*, 1686, 2 Bro. Supp. 95 ; *Laird of Heron*, 1760, 5 Bro. Supp. 876.

[6] Stair, iv. 22, 7 ; *Scot* v. *Tenants of Whitslaid*, *supra* ; *Moncrieff* v. *Laird of Balnagown*, *supra* ; *Belshes* v. *Tenants of Loudoun*, *supra*.

[7] *Prudential Assurance Co.* v. *Cheyne*, 1884, 11 R. 871 ; *Nelson's Trs.* v. *Tod*, 1896, 23 R. 1000 ; *Aberdeen Corporation* v. *British Linen Bank*, 1911 S.C. 239, per Lord Dundas at p. 242.

[8] Bell's Com. (7th ed.), i. 731 ; Bell's Prin. (10th ed.), s. 922.

[9] 1876, 3 R. 333, at p. 340.

[10] Goudy on Bankruptcy (4th ed.), p. 245, note (*e*).

[11] Mackay's Practice, ii. 309 ; Rankine on Leases (3rd ed.), p. 362.

[12] *Smith's Trs.* v. *D. & J. Chalmers*, 1890, 17 R. 1088, per Lord M'Laren at p. 1090.

803. The most usual case of the action of maills and duties is that by a heritable creditor under a bond and disposition in security. The owner of a ground-annual constituted by a contract containing a disposition of the lands in security and an assignation of the rents has a title to raise an action of maills and duties.[1] The grantee under a bond and disposition in security who afterwards came to hold, subject to the liferent of another, an *ex facie* absolute disposition of the same land, has been held entitled to raise the action in respect that, as his only title to the rents during the subsistence of the liferent was the bond, the rule that an *ex facie* absolute title cannot be the foundation of an action of maills and duties did not apply.[2] The holder of an assignation in security of a long lease under the Registration of Leases (Scotland) Act, 1857, is not entitled to enter into possession by means of an action of maills and duties.[3]

804. The action of maills and duties is not intended to establish a right to the rents. Such a right is presupposed in the title to sue. The object of the action is merely to prevent the tenants from paying the rents to any other person than the pursuer, and to put the pursuer in a position to enforce from the tenants payment to himself.[4] It has been stated, on the authority of *Fairlie's Trs.* v. *Fairlie*,[5] that an action of maills and duties is not a competent process for testing a question of heritable title to land; but this is doubtful.[6]

SUBSECTION (2).—*Defenders.*

805. Prior to the year 1894 the action of maills and duties, if petitory, was directed against the proprietor or the civil possessor (as, *e.g.*, a tacksman or liferenter) of the lands, and the tenants or natural possessors.[7] The proprietor or civil possessor, though called as a principal defender, was in effect called merely for his interest.[8] It was not, however, essential to call the proprietor.[9] All the tenants required to be called, the decree giving no right to the pursuer against those not called;[10] but no service or other intimation was necessary to entitle the pursuer to enforce his right against any tenant acquiring the land subsequent to decree, if all the tenants at the date of raising the action were called.[11] Under the Heritable Securities Act, 1894,[12] it is now unnecessary to call the tenants in an action of maills and duties at the instance of a heritable creditor against the proprietor of the ground. Where there are no tenants in the lands, the action is incompetent, as there are no rents.[1] If the action is possessory, no one has to be called but tenants or natural possessors.[2]

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[1] *Somerville* v. *Johnston*, 1899, 1 F. 726.

[2] *Crichton's Trs.* v. *Clarke* (O.H.), 1909, 1 S.L.T. 467.

[3] *Dunbar* v. *Gill*, 1908 S.C. 1054.

[4] *Home* v. *Tenants of Kello*, 1666, 1 Bro. Supp. 522; *Forsyth* v. *Aird*, 1853, 16 D. 197; *Chambers's Judicial Factor* v. *Vertue*, 1893, 20 R. 257.

[5] 1860, 22 D. 632.

[6] See Rankine on Leases (3rd ed.), p. 360.

[7] Stair, iv. 22, 14: Ersk. iv. 1, 49.

[8] *Robertson's Trs.* v. *Gardner*, 1889, 16 R. 705; *Schaw* v. *Black*, 1889, 16 R. 336.

[9] *Haliburton* v. *Tenants of Carse*, 1702, Mor. 2232.

[10] *Smith's Trs.* v. *Chalmers*, 1890, 17 R. 1088.

[11] *Robertson's Trs.* v. *Gardner*, *supra*.

[12] 57 & 58 Vict. c. 44.

Subsection (3).—*Jurisdiction.*

806. The Court in which the action is brought may be (1) the Court of Session, if the amount of the rents sued for exceeds £50; [3] (2) the Sheriff Court of the county in which the lands, or part thereof, lie, whatever be the amount of the rents sued for; or (3) the Justice of the Peace Court, if the amount of the rents sued for does not exceed £5 and there is no question of title involved. The jurisdictions of the Burgh and Baron Courts have never been taken away, but have become obsolete.[4]

Subsection (4).—*Summons.*

807. The form of a Sheriff Court summons of maills and duties at the instance of a heritable creditor, which is the most usual case, is given in Schedule A of the Heritable Securities (Scotland) Act, 1894.[5] The action will now be begun by initial writ as directed in the Sheriff Courts (Scotland) Acts, 1907 and 1913.[6] Where the action is raised in the Court of Session the old form of the summons [7] is used, with the necessary alterations consequent on the provisions of the Heritable Securities Act, 1894.[8]

808. Subject to the provisions of the Heritable Securities Act, the following are some of the rules relating to the form of the summons: The pursuer must set forth his title to sue.[9] What title is sufficient depends on whether the action is petitory or possessory.[10] In a question with tenants it gave a sufficient title to sue, to produce a sasine in the lands.[11] If the pursuer were not infeft, he had to produce his author's infeftment to instruct his title, unless his right had been in some way recognised by the defenders, as, *e.g.*, by their accepting a lease from him.[12] The character in which the tenants or possessors are due rent must also be set forth.[13] The summons concludes for payment not only of the rents due, but also of those to become due by the tenants during their possession, and decree may be granted for future rents as well as for those due at the date of action.[14]

809. In one case no interest on a bond was actually due when the creditor raised an action of maills and duties, and in the bond three months' premonition was stipulated for before calling up the principal sum; yet the debtor's estate having been sequestrated on the same day as that on which the action was raised, and a term's interest having fallen due before it was called in Court, the action was sustained.[1] Again, where the creditor under a bond and disposition in security in the statutory form given in Schedule F.F. (1) of the Titles to Land Consolidation (Scotland) Act, 1868, served upon the debtor a schedule of intimation, requisition, and protest in the form given in Schedule F.F. (2) of the Act, and ten days later brought an action of maills and duties to obtain possession of the lands and uplift the rents, it was held that the schedule of intimation was a demand for immediate payment; that the debtor not having paid instantly was in default of payment within the meaning of s. 119 of the Act; and, accordingly, that the action was competent, although the debtor was not in arrear with interest.[2] The conclusion for expenses is usually against the proprietor of the lands and against those tenants who appear and oppose.

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[1] *Smith's Trs.* v. *Chalmers*, 1890, 17 R. 1088.

[2] Stair, iv. 22, 14; Ersk. iv. 1, 49.

[3] Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. c. 51), ss. 5 (4) and 7.

[4] Rankine on Leases (3rd ed.), p. 363; Hunter on Landlord and Tenant, ii. 351; Mackay's Practice, ii. 308; Stewart on Diligence, p. 512.

[5] 57 & 58 Vict. c. 44.

[6] 7 Edw. VII. c. 51; and 2 & 3 Geo. V. c. 28, First Schedule, Rules 1 and 2; for style see Lewis's Sheriff Court Practice (7th ed.), p. 474.

[7] Juridical Styles (3rd ed.), iii. 35.

[8] 57 & 58 Vict. c. 44, s. 3.

[9] *Mackintosh* v. *Mackintosh*, 1835, 13 S. 884: *Hutchison* v. *Ferrier*, 1846, 8 D. 1228.

[10] See para. 800, *supra*.

[11] Stair, iv. 26, 4.

[12] Stair, iv. 22, 7.

[13] *Hutchison* v. *Ferrier*, *supra*.

[14] *Woodward* v. *Wilson*, 1829, 7 S. 566; *Bruce* v. *Grant*, 1824, 2 S. 657 (N.E. 552).

810. An important change was, as already indicated, made on the form of and procedure in an action of maills and duties at the instance of a heritable creditor by the Heritable Securities (Scotland) Act, 1894.[3] Under that Act the tenants in possession of the ground need not be called as defenders. Notice is given to them by registered letter in the form of Schedule B of the Act, whereupon they are interpelled from making payment of the rents to the proprietor, as if they were called as defenders in the action. On decree being granted, intimation thereof is made to the tenants by registered letter in the form of Schedule C, and thereafter they can be compelled to pay the rents in the same way as if they were charged under a decree of maills and duties in the former style. The tenant's right is reserved to refuse payment of the rent on any ground not affecting the creditor's title, or a prior creditor's right to enter into possession. The old form is left competent, and any right competent to the creditor of entering into possession without action is reserved.[4] Any person interested may take proceedings to interpel the creditor from entering into possession of the lands disponed in security, or collecting the rents thereof.[5] The Act only refers to actions at the instance of heritable creditors under heritable bonds, bonds and dispositions in security, bonds of annual-rent, bonds of annuity, and securities for cash credits,[6] so that if one not in this position desires to raise an action of maills and duties, he must use the old form.

SUBSECTION (5)—*Defences.*

811. The action fails where the pursuer does not produce a valid title to sue as above explained, or where, in a petitory action, a defender can show a better title to the rents than that of the pursuer. A pursuer can also be defeated by the production on the part of a defender of a possessory judgment following on seven years' possession, such possession being founded on a sufficient warrant, such as a tack.[1] The pursuer cannot recover arrears of rent from a tenant after five years from the date of his removing from the lands, unless he prove by writ or oath that the rent is due and resting owing.[2] A tenant cannot plead, in defence to an action at the instance of a heritable creditor, that he is entitled to retain the rent against a debt unconnected with the lease due to him by the landlord, or to set off the rent against the debt.[3] But if the tenant has under the lease a right of retention or compensation in respect of debts due by the landlord in connection with the lease, he may plead this against the creditor.[4] Though it is doubtful if a *pro indiviso* proprietor can sue for his share of the rents without the concurrence of his coproprietors, yet he cannot object to the title of his assignee under a bond and disposition in security to sue an action of maills and duties; but the other *pro indiviso* proprietors or the tenants have probably a title to do so.[5] A judicial factor in the management of the estate cannot come forward as a defender and exclude the pursuer.[6] Forehand payment of rent has been held in the Sheriff Court to be presumed to be collusive, and in the absence of proof of *bona fides* to be no defence in an action of maills and duties.[7] The action has been held incompetent where there was no default in payment of interest and there had been no demand for payment of the principal sum and consequently no default in payment.[8]

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[1] *Ferrier* v. *Dunlops,* 1831, 9 S. 837; *Graham's Trs.* v. *Dow's Trs.* (O.H.), 1917, 2 S.L.T. 154.

[2] *M'Ara* v. *Anderson,* 1913 S.C. 931.

[3] 57 & 58 Vict. c. 44.

[4] Sec. 3.

[5] Sec. 4.

[6] Sec. 18.

SUBSECTION (6).—*Effect of Decree.*

812. Decree in the action gives the pursuer the means of entering into possession and drawing the rents. The creditor may be entitled, however, to draw the rents without such decree, after intimation to the tenants of the assignation of rents held by him. The form of this intimation is dealt with below in relation to the preservation of the creditor's preference.[9] After such intimation to the tenants, the creditor may, it is thought, enforce payment of the rents by an ordinary petitory action.[10] The creditor will not, however, be entitled to the landlord's special remedies against the tenants without an action of maills and duties.[1] The creditor may, after taking decree in an action of maills and duties, charge the tenants to pay, and he may use arrestment and poinding. He may also sequestrate their effects in respect of the landlord's right of hypothec, so far as still competent.[2] Decree may give the pursuer right to proceed with an action of ranking and sale.[3] Sequestration is competent even against the successors to tenants who have been called as defenders, provided that the decree has been intimated to them.[4] Where, however, it is desired to use arrestment or poinding in such a case, some further warrant than the decree will be necessary, but it is not clear whether a decree in a petitory action will be required or whether it will be enough to obtain letters of horning and poinding by presenting a bill in the Bill Chamber.[5]

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[1] Stair, iv. 22, 16.

[2] Act, 1669, c. 9 : see para. 823, *infra.*

[3] *Chambers's Judicial Factor* v. *Vertue,* 1893, 20 R. 257.

[4] *Stewart* v. *M'Ra,* 1834, 13 S. 4 ; *Turner* v. *Nicolson,* 1834, 13 S. 633.

[5] *Schaw* v. *Black,* 1889, 16 R. 336 ; Stewart on Diligence, p. 513.

[6] *Ferguson* v. *Murray,* 1853, 15 D. 682.

[7] *Glasgow and West of Scotland Savings Investment Co.* v. *Mills,* 1882, Guthrie's Sheriff Court Cases, 2nd series, p. 258.

[8] *Gibson* v. *Blair,* 1918 S.C. 353 ; *Saxty* v. *Smiths & Co.* (O.H.), 1893, 1 S.L.T. 61.

[9] See para. 820, *infra.*

[10] Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), s. 119 ; Conveyancing (Scotland) Act, 1924 (14 & 15 Geo. V. c. 27), s. 25 ; Stewart on Diligence, p. 515 ; *Neils* v. *Lyle,* 1863, 2 M. 168.

813. The holder of a decree in an action of maills and duties may obtain a warrant of summary ejection against an occupier without title,[6] and a heritable creditor holding such a decree has probably power to pursue actions of removing against the tenants under the Act of Sederunt, 1756.[7] A creditor in right of a bond authorising him to output and input tenants has been held entitled, without raising an action of maills and duties, to a decree of summary removal against a tenant.[8] And such a decree may be obtained against a party in possession in a character similar to that of a tenant at will with no obligation to pay rent.[9]

814. The creditor's rights against the proprietor were different. Where a bond or even an *ex facie* absolute disposition expressly gave right to a creditor to enter into possession, remove the debtor and his tenants, and uplift the rents without any process of law, this was held not to entitle him to a decree of removing against the debtor.[10] A proprietor in personal occupation is now, however, under s. 5 of the Heritable Securities Act, 1894,[11] in the same position as a tenant at will.

815. Decree does not take away the right of property in a proprietor against whom it is pronounced: it only encumbers his right.[12] By decree no preference is obtained over the tenant's moveables. Such preference can only be obtained by sequestration or by poinding the ground.[13] While in general the pursuer in an action of maills and duties is not entitled to poind the ground,[14] a heritable creditor can do so before or after obtaining decree of maills and duties,[15] and he can raise a combined action of maills and duties and poinding of the ground.[16] An action of maills and duties may also be combined with an action by a heritable creditor to express his remedies under s. 26 of the Conveyancing (Scotland) Act, 1924.[1]

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[1] *Railton* v. *Muirhead*, 1834, 12 S. 757; *Hood* v. *Martin's Crs.*, 1835, 13 S. 923; *MacRosty* v. *Phillips*, 1898, 14 S.L.Rev. 69.

[2] *Railton* v. *Muirhead*, *supra*; *Robertson's Trs.* v. *Gardner*, 1889, 16 R. 705; Bell's Prin. (10th ed.), s. 914 (3).

[3] Bell's Lect. ii. 826.

[4] *Robertson's Trs.* v. *Gardner*, *supra*.

[5] Stewart on Diligence, p. 521.

[6] *Hutchison* v. *Alexander*, 1904, 6 F. 532.

[7] Gloag and Irvine on Rights in Security, p. 99.

[8] *Forsyth* v. *Aird*, 1853, 16 D. 197.

[9] *Blair* v. *Galloway*, 1853, 16 D. 291.

[10] *M'Farlane* v. *Campbell*, 1857, 19 D. 623; *Wyllie* v. *Heritable Securities Investment Association*, 1871, 10 M. 253; *Scottish Property Investment Building Society* v. *Horne*, 1881, 8 R. 737.

[11] 57 & 58 Vict. c. 44.

[12] Bell's Lect. ii. 1168.

[13] *Ibid.*, p. 1169.

[14] Ross, Lect. ii. 431.

[15] *Henderson* v. *Wallace*, 1875, 2 R. 272.

[16] See Juridical Styles (3rd ed.), iii. 202.

816. A heritable creditor in possession of land, and receiving rents under a decree of maills and duties, must account for his intromissions to the proprietor, or to others having a right to the rents postponed to his. He is entitled to credit himself with feu-duty and public burdens, expenses of management (including the employment of a factor), insurance, and repairs.[2] He may apply the balance to reduction of the principal debt. But after payment of the interest due to himself, he may pay over the balance of the rents to the proprietor of the land, without being responsible to those having postponed rights, unless he has taken possession in a competition with them, or until he has had the assignation of rents to them intimated to him.[3] If he is in right of two bonds, and a cautioner is liable on the prior bond, he must apply the rents in reduction of the prior debt.[4] It has been held that a creditor is not entitled, by application of the rents to reduction of the debt, to diminish a widow's terce, but that she is entitled to her full third of the rents, under deduction of one-third of the interest on the bond.[5] He is liable for the feu-duty due to the superior,[6] and he incurs, if he conducts himself as owner of the subjects, the liabilities to third parties which attach to ownership of the land.[7] The creditor in possession is not, however, necessarily liable for public burdens.[8] He is not liable for the cost of repairs ordered by the proprietor, or for performance of contracts undertaken by him relating to the security subjects.[9]

817. A creditor in possession might at common law grant leases for the term of his possession.[10] Now, under the provisions of the Heritable Securities Act, 1894, a creditor in possession of the security subjects may grant leases for periods not exceeding seven years, and he may apply to the Sheriff for power to let the land on longer leases, not, however, exceeding twenty-one years for heritable property in general, and thirty-one years for minerals.[11] He may reduce leases fraudulently granted by the proprietor.[12]

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[1] 14 & 15 Geo. V. c. 27.

[2] Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), s. 119; Conveyancing (Scotland) Act, 1924 (14 & 15 Geo. V. c. 27), s. 25; *Liquidator of City of Glasgow Bank* v. *Nicolson's Trs.*, 1882, 9 R. 689.

[3] *Brown* v. *Rae*, 1835, 13 S. 256; Bell's Prin. (10th ed.), s. 914 (3).

[4] *Scott* v. *Fotheringham*, 1859, 21 D. 737.

[5] *Belschier* v. *Moffat*, 1780, Mor. 15863; *Black's Trs.* v. *Scott*, 1895, 3 S.L.T. 8; Stewart on Diligence, p. 519, note 8.

[6] *Liquidator of City of Glasgow Bank* v. *Nicolson's Trs.*, *supra*; Gloag and Irvine on Rights in Security, p. 101.

[7] *Baillie* v. *Shearer's J.F.*, 1894, 21 R. 498; see *Miller* v. *Gray*, 1929 S.C. 564.

[8] *Argyll County Council* v. *Walker*, 1909, S.C. 107; *Lanarkshire County Council* v. *Miller*, 1917 S.C. 35; but cf. *Greenock Board of Police* v. *Liquidator of the Greenock Property Investment Society*, 1885, 12 R. 832.

[9] Bell's Prin. (10th ed.), s. 538; More's Notes on Stair, p. lv; *Selby's Heirs* v. *Jollie*, 1795, Mor. 13438; *Anderson* v. *Kennedy's Trs.* (Sh. Ct.), 1897, 4 S.L.T. 270; *Heron* v. *Martin*, 1893, 20 R. 1001.

[10] Bell's Lect. ii. 1170.

[11] 57 & 58 Vict. c. 44, ss. 6 and 7.

[12] *Hart* v. *Ross*, 1828, 6 S. 1110.

818. In *Macrae* v. *Leith*[1] it was held that a bondholder in possession under a decree of maills and duties was entitled to obtain delivery of the leases and other estate documents, showing the contractual relations between the landlord and his tenants, for the purpose of enabling him to appear as a party to proceedings in the Land Court.

819. A creditor in possession under a decree in an action of maills and duties has been held not to be bound to grant an assignation of his bond while there is a dispute between him and the debtor regarding his account of intromissions.[2] A creditor in possession under such a decree has been held entitled to premonition when the debtor desires to repay the debt.[3]

SUBSECTION (7).—*Competition with Decree of Maills and Duties.*

820. Before 1839 the execution of a summons of maills and duties after sequestration, and even after the confirmation of the trustee, gave the pursuer a complete preference over the rents.[4] The Bankrupts' Estates Act, 1839,[5] limited the extent of the preference to one and a half year's interest, viz. the current half-year's interest and one year's arrears, unless a charge had been given sixty days before the date of the sequestration, but left undisturbed the right to insist in the action. This enactment was repealed by the Bankruptcy Act, 1856,[6] but was substantially re-enacted by s. 118 of the latter Act.[7] Sec. 118 of the Act of 1856 was repealed by the Conveyancing Act, 1874,[8] and the law as it was before 1839 restored.[9] Sec. 55 of the Act of 1874 was repealed by the Statute Law Revision Act, 1883.[10] The provisions of s. 118 of the Act of 1856 were re-enacted as to poindings of the ground by the Conveyancing (Scotland) Act, 1874, Amendment Act, 1879,[11] but not as to actions of maills and duties; and the provisions of the Act of 1879, which was repealed by the Bankruptcy (Scotland) Act, 1913,[12] have been re-enacted in s. 114 of that Act. A heritable creditor can now obtain by action of maills and duties, raised even after confirmation of the trustee on his debtor's sequestrated estate, a complete preference over the rents for the amount of the debt and interest.[13] But if the action is raised after sequestration, the creditor is not entitled to recover his expenses from the trustee.[14]

821. To preserve his preference against the other creditors, the heritable creditor in general uses an action of maills and duties. But where the creditor holds an assignation of rents, intimation to the tenants of this assignation may be sufficient. Intimation may be either by the judicial appearance of the creditor, as, for example, in a process of multiplepoinding,[1] or by intimation to the tenants individually in any of the modes appropriate to intimation of the assignation of a personal debt.[2] It was held, however, in one case,[3] that the right of a house factor to retain rents collected by him, in repayment of a debt due to him by the proprietor, was preferable to the right of a bondholder who had not raised an action of maills and duties. Citation of the tenants on a summons of poinding of the ground at the instance of the creditor in a bond and disposition in security, or decree thereunder, is not a valid intimation,[4] unless special reference is made in the summons to the assignation of rents.[5] Intimation will secure for the creditor a preference, provided his infeftment is prior to any competing diligence,[5] or, being subsequent to the competing diligence, is prior to the date of payment of the rents and has been intimated to the tenants before the rents have been uplifted.[6]

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[1] 1913 S.C. 901.

[2] *Bruce* v. *Scottish Amicable Life Assurance Society*, 1907 S.C. 637.

[3] *Ibid.*, per Lord Salvesen (Ordinary) at p. 641.

[4] *Ferrier* v. *Dunlops*, 1831, 9 S. 837; *Campbell's Trs.* v. *Paul*, 1835, 13 S. 237; *Dick's Trs.* v. *Whyte's Tr.*, 1879, 6 R. 586.

[5] 2 & 3 Vict. c. 41, s. 95.

[6] 19 & 20 Vict. c. 79, s. 2.

[7] See *Budge* v. *Brown's Trs.*, 1872, 10 M. 958.

[8] 37 & 38 Vict. c. 94, s. 55.

[9] *Royal Bank* v. *Bain*, 1877, 4 R. 985.

[10] 46 & 47 Vict. c. 39.

[11] 42 & 43 Vict. c. 40, s. 3.

[12] 3 & 4 Geo. V. c. 20.

[13] Goudy on Bankruptcy (4th ed.), p. 245.

[14] *Johnston* v. *Budge*, 1871, 8 S.L.R. 381.

Section 3.—Assignation of Maills and Duties.

822. This is synonymous with what is now generally called assignation of rents.[7]

Section 4.—Prescription of Maills and Duties.

823. By the Statute 1669, c. 9, it is enacted: "And likewayes Mails and Duties of tennents, not being pursued within five years after the tennents shall remove from the lands for which the mails and duties are craved, shall prescrive in all time coming; except the saids . . . mails and duties shall be offered to be proven to be due and resting-owing by the defenders their oaths, or by a special writ under their hands, acknowledging what is resting-owing." Erskine says that the Act was introduced to protect tenants, natural possessors of the ground, from the effects of their rusticity or ignorance in business.[8] It was applied, however, in the case of a tacksman of the whole estate.[9]

824. It has been held that the Act did not apply in the case of a liferenter who held a tack of the liferented lands and continued to possess them as proprietor after the death of the fiar,[10] or of a tacksman of maills and duties,[11] apparently on the ground in both cases that these were not tenants within the meaning of the Act. The Act applies whether the lease on which the tenant possessed was written or verbal,[11] and whether the tenement let was rural or urban.[1] The dependence of a sequestration in security for rent does not bar the prescription,[2] but a sequestration for past-due rents does.[3] If the landlord judicially pleads the rents in compensation of a debt due by him to the tenant, or, where the tenant has retained the rents, in security of a debt due by the landlord, this bars the running of prescription; [4] but the landlord cannot plead compensation if the rents have already prescribed.[5] The Act was held to apply to the case of a partner of a firm who had undertaken an obligation to relieve his copartners of rent due by them,[6] and to the case of a cautioner for a tenant.[7] The prescription does not begin to run till the tenant's removal.[8] Partial payments by the tenant, made within the five years, found no interruption of prescription, as tending rather to fortify the presumption that all bygones are cleared; [9] but if payments of interest made after the expiry of the five years can be proved by the tenants' writ, this will be sufficient to prove the debt.[10]

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[1] *Budge* v. *Brown's Trs.*, 1872, 10 M. 958; *Kelhead* v. *Wallace*, 1748, Mor. 2785; *Webster* v. *Donaldson*, 1780, Mor. 2902.

[2] Ersk. iii. 5, 4; *Hope* v. *Wauch*, 12th June 1816, F.C.; *Neils* v. *Lyle*, 1863, 2 M. 168.

[3] *Stevenson, Lauder & Gilchrist* v. *Dawson*, 1896, 23 R. 496.

[4] *Royal Bank* v. *Dixon*, 1868, 6 M. 995.

[5] *Lang* v. *Hislop*, 1854, 16 D. 908.

[6] Stewart on Diligence, p. 164; Duff's Feudal Conveyancing, p. 93; Bell's Com. i. 794; *Huntly* v. *Hume*, 1628, Mor. 2764; *Cuming* v. *Cuming*, 1628, Mor. 2764; *Litster* v. *Aitoun*, 1667, Mor. 2765; *Gelly* v. *Crs. of Monimusk*, 1715, Mor. 2890; *Chambers's Judicial Factor* v. *Vertue*, 1893, 20 R. 257.

[7] See CHARTER (FEUDAL), Vol. III. p. 283, *ante*.

[8] Ersk. iii. 7, 20.

[9] *Fairholm* v. *Livingstone*, 1725, Mor. 11058.

[10] *Murray* v. *Trotter*, 1709, Mor. 11054.

[11] *Nisbet* v. *Baikie*, 1729, Mor. 11059.

825. For the rules relating to proof of the debt by writ or oath of the defender, see OATH ON REFERENCE.

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[1] *Boyes* v. *Henderson*, 1823, 2 S. 190 (N.E. 169).

[2] *Cochrane* v. *Fergussons*, 1830, 8 S. 324.

[3] *Hogg* v. *Low*, 1826, 4 S. 702 (N.E. 708).

[4] *M'Donald* v. *Jackson*, 1826, 5 S. 28 (N.E. 26); *Nicolson* v. *M'Alister's Trs.*, 1832, 10 S. 759; *Heddle* v. *Baikie*, 1847, 9 D. 1254.

[5] *M'Intosh* v. *Baillie*, 1753; Elchies, *s.v.* "Prescription," No. 35.

[6] *Daes* v. *Scougal*, 1710, Mor. 11056.

[7] *Duff* v. *Innes*, 1771, Mor. 11059.

[8] *Strahorn* v. *Cunningham*, 1739, Mor. 11059; *Johnston's Exrs.* v. *Johnston*, 1897, 24 R. 611.

[9] *Nisbet* v. *Baikie*, 1729, Mor. 11059.

[10] Dickson on Evidence (3rd ed.), i. ss. 458 and 482.

MAIMING.

See CRIME.

MAINTENANCE.

See ALIMENT.

MAIR.

See SHERIFF.

MAJOR.

See MINORS AND PUPILS.

MALA FIDES.

See BONA FIDES.

MALE APPRETIATA.

See CONFIRMATION OF EXECUTORS.

MALE SERVANT.

See EXCISE.

MALICE.

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SECTION 1.—INTRODUCTORY.

826. Broadly speaking, the term malice may be taken as co-extensive with wrongful intention. To attempt more than a broad definition of something which exists merely in the mind is impossible, even if it were desirable. "Disputes as to the meaning and place of the words 'malice' and 'maliciously' in the law of tort are now old and have not been wholly settled. Perhaps they never will be. Between ethics and law on these subjects no sharp line has yet been drawn. Between the man who exercises his legal rights with hatred in his heart, and the man who means well but fails to keep his action on the windy side of the law, there is a large field not altogether covered by legal decisions." [1] Mere naked intention, however wrongful, is of no legal significance whatever. The law takes no cognisance of malice until it is clothed and evidenced by some overt act. "Malice is in the breast of the party accused, and it cannot be known to the outer world unless there has been some act that evinces malice and from which the existence of the malice is to be deduced." [2]

SECTION 2.—ACTIONABLE WRONGS.

827. The overt act in and by which malice is expressed may be an act done in breach of a public or private duty, and therefore in either case wrongful. Where the act is done in violation of those duties which an individual owes to the community, the malice or wrongful intention is, in our law, generally spoken of as dole, and the act itself as crime—*crimen dolo contrahitur.* Used in this sense, malice or wrongful intention is the essential factor in crime, and it may vary from deliberate purpose down to that gross negligence or *culpa lata* which the law regards as involving responsibility in a criminal Court. In this aspect, the legal bearing of malice belongs to the department of criminal law, and is elsewhere treated.[1]

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[1] *Sorrell* v. *Smith*, [1925] A.C. 700, per Lord Sumner at pp. 737, 738.

[2] *Gordon* v. *British and Foreign Metaline Co.*, 1886, 14 R. 75, per Lord Justice-Clerk Moncreiff at p. 84.

828. Where, on the other hand, the overt act which expresses or evidences malice or wrongful intention is an act done in breach of a private duty, the determination of the legal significance of malice forms part of the law which relates to the legal remedies afforded for damage caused by actionable wrongs or torts. In this connection, malice, inasmuch as it presupposes a positive act on the part of the wrong-doer, is frequently used, in contrast to negligence, as marking a broad division of actionable wrongs into intentional and unintentional wrongs. "Malice is active—commission; negligence is passive—omission. The duty which malice offends against is a duty to refrain from doing something. The duty which negligence offends against is a duty to do something. In the one, a person causes injury by his doing something which he has no occasion or excuse for doing; in the other, he causes injury by failing to take action, by being inactive without excuse."[2] But while this offers a convenient division of actionable wrongs for the purpose of general classification, it is apt to be misleading. For example, slander and assault are frequently included among breaches of duty which spring from wrongful intention. In neither case, however, is an active wrongful intention a necessary element in the constitution of the wrong. Slander is an actionable wrong although there be no active wrongful intention. In other words, the presence of such wrongful intention is in such cases accidental, not essential. It is, accordingly, necessary to distinguish clearly between those cases in which the law infers malice from the act complained of and those cases where active wrongful intention is of the essence of a wrong,

SUBSECTION (1).—*Where Malice is of the Essence of the Wrong.*

829. In the case of a few actionable wrongs, more or less akin to crime—for example, seduction (in Scots law) and fraud—positive wrongful intention, or such ignorance or indifference as amounts to guilty recklessness—for *culpa lata dolo æquiparatur*—is of the essence of the wrong. It alone renders the injury an actionable wrong, and must necessarily be averred in order to make an action relevant. Malicious prosecution and abuse of civil process may perhaps be regarded as in the same category. See ABUSE OF CIVIL PROCESS.[3]

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[1] See CRIME, Vol. V. para. 124 *et seq*; see also Hume, i. 26 *et seq.*

[2] Glegg, Reparation, 2nd ed., p. 8.

[3] Vol. I. p. 21, *ante*; see also Pollock, Torts, 13th ed., p. 322 *et seq.*

SUBSECTION (2).—*Where Malice is not of the Essence of the Wrong.*

830. On the other hand, in most cases of actionable wrongs, malice in the sense of positive wrongful intention is not the root of the wrong. The act done is regarded as being *prima facie* actionable, independently of any positive wrongful intention which accompanied the doing of it; and malice need only be pled to counter or elide an anticipated defence, In these cases "the knowledge or state of mind of the person violating the right is not material for determining his legal responsibility." [1] Our forms of pleading do not preserve this distinction, because, in most cases in which the facts show that proof of positive wrongful intention will be necessary to ultimate success, averments of malice are generally stated *in limine*, and in anticipation of the defence.

SUBSECTION (3).—*Malice in Fact and in Law.*

831. In view of recent decisions, the distinction between what is known as malice in fact and malice in law would seem to be a very narrow one. Malice in fact has been defined as personal spite or ill-will against an individual; malice in law, as the intention of doing an act which was in fact the breach of a legal duty, whether known by the doer to be so or not.[2] "Between malice in fact and malice in law there is a broad distinction which is not peculiar to any particular system of jurisprudence. A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far as the state of his mind is concerned, he acts ignorantly, and in that sense innocently. Malice in fact is quite a different thing; it means an actual malicious intention on the part of the person who has done the wrongful act, and it may be, in proceedings based on wrongs independent of contract, a very material ingredient in the question of whether a valid cause of action can be stated." [3] But the existence of malice must in every case, privileged or non-privileged, be an inference from the facts and circumstances established by the proof. The definition of malice covers any indirect or improper motive, though not directed against any individual in particular. As regards the evidence from which malice may be inferred, see DEFAMATION.[4]

SUBSECTION (4).—*Malice as an Answer to the Plea of Justification.*

832. Many acts *prima facie* wrongful are justified or excused owing to the exceptional circumstances which attend them. "There are various conditions which, when present, will prevent an act from being wrongful, which in their absence would be a wrong. Under such conditions the act is said to be justified or excused."[1] So the forcible invasion of the liberty of another person is *prima facie* a wrong; but if the invader be a constable acting in the due discharge of his duty, the law holds the act to be justified. Again, defamation is a wrong, but there are circumstances, *e.g.* where the occasion is "privileged," in which a man may with impunity make and publish untrue statements to the prejudice of another. Now, the legal effect of malice is to cut down or elide the force of this "justification" or "privilege."

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[1] Pollock on Torts, 13th ed., p. 287.

[2] *Bromage* v. *Prosser*, 1825, 4 B. & C. 247, per Bayley J. at p. 254 *et seq.*; Glegg, Reparation, 2nd ed., p. 6.

[3] *Shields* v. *Shearer*, 1914 S.C. (H.L.) 33, per Lord Chancellor at p. 34; see also *Hayford* v. *Forrester-Paton*, 1927 S.C. 740, per Lord Justice-Clerk at p. 754.

[4] Vol. V. p. 483, *ante*.

833. The principle here stated finds its clearest illustration in questions of slander. In our law malice, actual or implied, is regarded as an essential element in slander.[2] Nevertheless, the gist of the legal wrong lies not in the malice or intent to injure, but in the fact that the statement complained of is false and defamatory. "The man who defames another by false allegations is liable to an action, however good his motive, and however honestly he believed in the statement he made.[3] "Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent";[4] and liability for false statements has been held to follow even where no positive wrongful intention existed or was even alleged.[5] The existence or non-existence of malice in the sense of positive wrongful intention is always a material factor in estimating damages,[6] but, as bearing on the liability of the defender it only becomes relevant when "justification"—that is, privilege—is pleaded by the defender, or raised by the circumstances of the case. Our law has always held that it is only in such cases that the specific acts from which malice is sought to be inferred require to be averred; the statement of Lord Herschell that "because in a strictly limited class of cases the law allows the defence that the statements were made in good faith, it is illogical to affirm that malice constitutes one of the elements of the torts known to the law as libel and slander,"[7] requires, it is thought, to be read as applying to malice in the sense above explained.

Subsection (5).—*Necessity for Specific Averments of Malice.*

834. A bare averment of malice as an answer to a case of privilege is, in general, not sufficient, and the pursuer must specify, in addition, outward acts, words, or circumstances from which malice may be inferred.[1] The rule of law which requires facts and circumstances, in addition to a bare averment of malice, to be stated by the pursuer in answer to a plea of "privilege," applies "to all cases where a defamatory statement is made in pursuance of any definite and special duty, whether to the public or to an individual, including any duty owed to the aggrieved person."[2] This statement of the law was amplified in a subsequent case in which, after quoting the above rule, Lord Pres. Kinross stated: "It might be proper to add to this statement of the rule 'or in the exercise of any right.'"[3] The question as to whether or not the pursuer's averments are sufficient to infer malice is one to be determined by the facts of each particular case. "The rule requiring specific averments of malice merely comes to this, that when a person who is privileged, and on a privileged occasion, says of another what is not true in fact, nevertheless he is assumed to have said it in good faith in the performance of a duty, or in the exercise of a right, unless there is some averment made on record which displaces that assumption."[4] Thus, in the case of judicial slanders, or of persons making statements by an officer of law, or of slanders uttered by public officials in the performance of a public duty, the occasion is highly privileged and much more specific averments of malice will be required than where the statement is made to a fellow-servant, in which case "the same pointed and detailed averments of facts and circumstances inferring malice are not required, and an averment of malice in general circumstances might be enough."[5] Each case must depend upon its own averments, and the strength or weakness of the averments of malice may depend upon the nature of the privileged occasion. It has been said that the evidence of malice may be intrinsic or extrinsic. As regards the first of these categories, Lord Dunedin, in the case of *Adam* v. *Ward*,[6] refers to defamatory words from their nature alone affording evidence of express malice. He then points out that, if the judge considers the words so capable, he must leave it to the jury to say whether, from the words alone, or in conjunction with extrinsic evidence, if there be any such, express malice has been proved.[7] "No doubt there are more ways than one in which the appropriate and all-essential averments may be made. If malice requires to be inferred from what has been called extrinsic facts and circumstances, these extrinsic facts and circumstances must be clearly set out upon the record. If, again, malice is to be inferred from the circumstances under which the particular slander was uttered, these circumstances must be set out clearly upon the record. . . . But if, on the other hand, malice is to be inferred from the form of language used on the occasion complained of, from its intensity, its violence, virulence, or recklessness, then the language itself is the fact and circumstance from which malice must be inferred."[1] Probably the best test as to the sufficiency of averments is whether the defender has fair notice upon the record of the case which he will be called upon to meet at the trial.[2]

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[1] Pollock on Torts, 13th ed., p. 113.

[2] Bell's Prin., s. 2044; Glegg, Reparation, pp. 140, 163.

[3] *Allen* v. *Flood*, [1898] A.C. 1, per Lord Herschell at p. 125.

[4] *Ibid.*, per Lord Watson at p. 92.

[5] *Outram & Co.* v. *Reid*, 1852, 14 D. 577; *Shepheard* v. *Whitaker*, 1875, L.R. 10 C.P. 502; *Hutton* v. *Jones*, [1909] 2 K.B. 444; [1910] A.C. 20.

[6] *Bromage* v. *Prosser*, 1825, 4 B. & C. 247, per Bayley J. at p. 257; *Anderson* v. *Calvert*, 1908, 24 T.L.R. 399; Pollock on Torts, p. 285.

[7] *Allen* v. *Flood*, *supra*, per Lord Herschell at p. 126.

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[1] *Scott* v. *Turnbull*, 1884, 11 R. 1131.

[2] *Sheriff* v. *Denholm*, 1898, 5 S.L.T. 234, per Lord Kyllachy at p. 235.

[3] *Macdonald* v. *M'Coll*, 1901, 3 F. 1082, per Lord Pres. Kinross at p. 1084.

[4] *Macdonald* v. *M'Coll*, *supra*, at p. 1086.

[5] *Ingram* v. *Russell*, 1893, 20 R. 771, per Lord Pres. Robertson at p. 777.

[6] [1917] A.C. 309, at p. 328.

[7] *Hayford* v. *Forrester-Paton*, 1927 S.C. 740, per Lord Hunter (dissenting judgment) at p. 761.

835. In some cases the terms of the documentary evidence may be such as to point so conclusively to malice on the part of the defender that further specification is unnecessary,[3] or the statements of the defender, as ascertained from the whole averments,[4] may have been so gross or reckless as to carry in themselves a presumption that they were uttered maliciously. "It is a rule of law that where statements are made recklessly, without sufficient enquiry, and without ordinary and reasonable regard to the character of others, such words may be held to have been uttered maliciously."[5] These are instances of exceptions to the general rule that a bare averment of malice is not sufficient, to which should be added the statement that "In order to make a relevant case of malice, there must be facts and circumstances alleged which are . . . independent of the immediate cause of circulating the slander."[6] Recent decisions appear, if not unanimously,[7] to support the view that the rule as to specific averments will, save in exceptional circumstances, be rigidly adhered to.[8]

836. The decisions upon this topic are very numerous and it is hard to reconcile some of the *dicta* with any general principle. That this is so is, perhaps, not unnatural in view of the fact that it must be a matter of opinion for the particular judge or judges concerned as to which cases fall within the general rule, and which within the exceptions. It would appear that, as above stated, the common-sense test should prevail in most cases, namely—Has the pursuer set forth upon the record a case which gives sufficient notice to the defender of the facts which he intends to prove as rebutting the justification for statements, otherwise slanderous, made upon a privileged occasion? (For a detailed citation of the decided cases on this topic, see DEFAMATION.[9]) It has been held that the mere fact that a defender has placed on record a plea of *veritas* has no bearing on the question of malice and that it cannot, accordingly, be founded on by the pursuer as inferring malice.[10]

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[1] *Suzor* v. *M'Lachlan*, 1914 S.C. 306, per Lord Pres. Strathclyde at p. 312.

[2] *Campbell* v. *Cochrane*, 1905, 8 F. 205, per Lord M'Laren at p. 214; *Suzor* v. *M'Lachlan*, *supra*, per Lord Pres. Strathclyde at p. 312.

[3] *Macdonald* v. *M'Coll*, 1901, 3 F. 1082.

[4] *Mitchell* v. *Smith*, 1919 S.C. 664, per Lord Mackenzie at p. 673.

[5] *Finburgh* v. *Moss Empires*, 1908 S.C., per Lord Ardwall at p. 940; see, however, *Gorman* v. *Moss Empires*, 1913 S.C. 1; *A. B.* v. *X. Y.*, 1917 S.C. 15.

[6] *Campbell* v. *Cochrane*, *supra*, per Lord M'Laren at p. 214; see also *Chalmers* v. *Barclay, Perkins & Co.*, 1912 S.C. 521, per Lord Justice-Clerk at p. 530.

[7] *Suzor* v. *M'Lachlan*, *supra*, per Lord Skerrington at p. 314 *et seq.*

[8] E.g. *Suzor* v. *M'Lachlan*, *supra*; *Cochrane* v. *Young*, 1922 S.C. 696; *Dunnet* v. *Nelson*, 1926 S.C. 764.

[9] Vol. V. p. 483, *ante*.

[10] *Hayford* v. *Forrester-Paton*, 1927 S.C. 740.

837. On the analogy of "privilege," where in an action for libel the defence is one of "fair comment," evidence that the defendant was actuated by malice is admissible as leading to the strong inference that the comment was not a fair one.[1]

SUBSECTION (6).—*Cases of Absolute Privilege.*

838. The existence and proof of malice are, of course, immaterial in cases of absolute privilege. This is a protection granted by law to certain classes of persons on the grounds of public policy, *e.g.* Members of Parliament for words spoken in Parliament, judges, counsel, certain official communications and reports, etc. (see DEFAMATION[1]). "It is only in cases in which such (*i.e.* absolute) privilege is enjoyed that malice is irrelevant. In all cases of qualified privilege malice is important.[2] If a judge were liable to be sued in respect of words uttered in his judicial capacity, on the averment . . . that he uttered the words maliciously . . . he would be exposed to answer what, *ex facie* of the summons, was apparently a relevant charge. Now, if that were permitted, the protection of absolute privilege would disappear." [3] In such cases no action lies, "and this though the words written or spoken were written or spoken maliciously, without any justification or excuse, and from personal ill-will and anger against the person defamed." [4]

SUBSECTION (7).—*Cases of Abuse of Process.*

839. The principles above stated might also be illustrated in cases of civil actions for assault. Even in the case of abuse of civil process, which has generally been classed among wrongs to the constitution of which malice is essential, it may be doubted whether the wrong ought not to be regarded as completed by the raising of process without reasonable and probable cause; the necessity for instructing malice being, on the analogy of privilege in cases of slander, merely a concession granted to the defender upon grounds of public policy.[5]

SECTION 3.—MALICE IN CONJUNCTION WITH A LAWFUL ACT.

SUBSECTION (1).—*In General.*

840. There remains the question of the legal significance of malice when appearing in conjunction with an act in itself lawful. It was at one time thought that, where a man was injured by the lawful exercise of another man's legal right, the presence of a malicious or improper motive in him who did the injury would convert this exercise of a legal right into an actionable wrong. This doctrine has, however, been finally decided to be erroneous. In the civil law it was otherwise,[1] an act otherwise lawful in itself being deemed illegal if done with malicious intent; and this principle was supposed to have been adopted in our law.[2] The result of recent decisions, however, is to settle that no person or combination of persons, who have a legal right to do what they threaten or intend to do, can be interfered with, however vexatious or selfish their conduct may be, provided the means employed be lawful and in the cause of furthering their legitimate self-interest,[3] and that no act of an individual, lawful in itself, can be converted by a malicious or bad motive into an unlawful act, so as to make the doer of the act liable to a civil action.[4] "It appears to me to be against sound principle to hold that the additional ingredient of malicious motive should give a right of action against an individual for an act which, if done without malice, would not be wrongful, although it results in damage to a third person." [5]

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[1] See DEFAMATION, Vol. V. p. 483, *ante*; *Thomas* v. *Bradbury, Agnew & Co.*, [1906] 2 K.B. 627.

[2] *Cochrane* v. *Young*, 1922 S.C. 696, per Lord Hunter at pp. 704, 705.

[3] *Primrose* v. *Waterston*, 1902, 4 F. 783, per Lord Moncreiff at p. 793.

[4] *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q.B. 431, per Lopes J. at p. 451; see also DEFAMATION; Glegg, Reparation, at p. 168 *et seq.*; Pollock, Torts, at p. 271 *et seq.*; Cooper on Defamation, 2nd ed., at p. 129 *et seq.*

[5] *Allen* v. *Flood*, [1898] A.C. 1, per Lord Herschell at p. 125 and Lord Davey at p. 172. See also ABUSE OF CIVIL PROCESS, Vol. I. p. 21, *ante*.

SUBSECTION (2).—*Malicious Conspiracy.*

841. The questions as to what does or does not constitute a malicious conspiracy, and as to how far acts which would have been legal if done by one person become illegal if done by a combination, have given rise to much controversy in recent years. The four leading cases upon these topics are *The Mogul Steamship Co.*,[3] *Allen* v. *Flood*,[6] *Quinn* v. *Leathem*,[7] *and Sorrell* v. *Smith*.[8] The effect of the three earlier decisions is stated as follows by the Lord Chancellor in *Sorrell* v. *Smith*.[9] "(1) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable. (2) If the real purpose of the combination is not to injure another but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues." In the same case [10] Lord Dunedin repeated with approval his recapitulation of the effect of the earlier decisions in *Mackenzie* v. *Iron Trades Employers' Insurance Association, Ltd.*[11] as follows: "But I think the three leading cases upon the subject, without any doubt are the well-known cases of *The Mogul Steamship Company* v. *M'Gregor, Gow & Company*, of *Allen* v. *Flood*, and of *Quinn* v. *Leathem*. Now, the result of these cases, in my mind, is this: In the first place, every one has the right to conduct his own business upon his own lines, and as suits him best, even although the result may be that he interferes with other people's business in so doing. That general proposition, I think, may be gathered from the *Mogul* case. Secondly, an act that is legal in itself will not be made illegal because the motive of the act may be bad. That is the result, I think, of *Allen* v. *Flood*. Thirdly, even although the dominating motive in a certain course of action may be the furtherance of your own business or your own interests, as you conceive those interests to lie, you are not entitled to interfere with another man's method of gaining his living by illegal means, and illegal means may either be means that are illegal in themselves or that may become illegal because of conspiracy when they would not have been illegal if done by a single individual. I think that is the result of *Quinn* v. *Leathem*."

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[1] Dig. xxxix. 3, 1, 9.

[2] Bell's Prin., s. 966.

[3] *Mogul Steamship Co.* v. *M'Gregor, Gow & Co.*, 1889, 23 Q.B.D. 598; [1892] A.C. 25.

[4] *Allen* v. *Flood*, [1898] A.C. 1; *Mayor of Bradford* v. *Pickles*, [1895] A.C. 587.

[5] *Allen* v. *Flood, supra*, per Lord Davey at p. 172.

[6] [1898] A.C. 1.

[7] [1901] A.C. 495.

[8] [1925] A.C. 700.

[9] At p. 712.

[10] At p. 718.

[11] 1910 S.C. 79, at p. 82.

842. With the exception of Lord Buckmaster, the other judges who heard the case of *Sorrell* v. *Smith* [1] refrained from expressing opinions upon the further question raised in the passage from Lord Dunedin's judgment quoted above, namely, as to whether acts which would be legal if done by an individual may become illegal if done by a combination of persons as the result of a conspiracy.[2] It seems almost impossible to reconcile the judgment in *Quinn* v. *Leathem* with those of the *Allen* v. *Flood* and *Mogul Steamship Co.* upon any other hypothesis. In the *Mogul* case the ground of decision was that the defendants did what they had a right to do in the lawful protection of their own trade interests, and though they may have been actuated by malice, that *per se* did not supply a ground of action. In that case Lord Halsbury stated: [3] "If no legal right has been interfered with, and no legal injury inflicted, it is vain to say that the thing might have been done by an individual but cannot be done by a combination of persons." This view appears to be implicit in the judgment of the Lord Chancellor in *Sorrell* v. *Smith*. But, if this be the correct view, it is very difficult to reconcile the judgments in the various cases. In *Quinn* v. *Leathem* [4] it was held that a combination of two or more, without justification or excuse, to injure a man in his trade by inducing his customers or servants to break their contracts with him, or not to deal with him, is actionable if it results in damage to him. The distinction upon which the judgment in *Sorrell* v. *Smith* [5] came to be based appears to lie in the fact that whereas in the *Mogul Steamship Co.*[6] the defendants did what they did in fair competition and actuated by legitimate self-interest, in *Quinn* v. *Leathem*,[4] in circumstances very similar, a conspiracy to injure a man in his trade was held to be unlawful, "for competition is not even suggested as a justification of the acts now complained of—acts of wanton aggression, the outcome of a malicious but successful conspiracy to harm the plaintiff in his trade." [7]

843. That such a distinction is a very narrow one is apparent from an examination of the facts in *Sorrell* v. *Smith*.[5] In that case certain newspaper proprietors sought to protect their trade by threatening to discontinue supplies to a newsagent, and also to S. (who supplied W.) unless he ceased supplying papers to W. while W. supplied papers to the plaintiff. The plaintiff had been a customer of R., another newsagent, and had, in order to have the question raised, transferred his patronage to W. It was held that the real purpose of the defendants was to protect their trade and not to damage W. or S., and that, accordingly, the case was governed by the decision in the *Mogul Steamship Co.*[1] In order, however, to protect their trade, it was obviously necessary that the defendants should damage W. and also S. "How any definite line is to be drawn between acts, whose real purpose is to advance the defendants' interests, and acts, whose real purpose is to injure the plaintiff in his trade, is a thing which I feel at present beyond my power. When the whole object of the defendants' action is to capture the plaintiff's business, their gain must be his loss. How stands the matter then? The difference disappears. The defendants' success is the plaintiff's extinction, and they cannot seek the one without ensuing the other. I trust that what has been said on this occasion will not be taken as conclusive of these questions should they ever arise." [2]

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[1] [1925] A.C. 700.

[2] *Sorrell* v. *Smith*, [1925] A.C. 700, per L.C. at p. 713; Lord Sumner at p. 739.

[3] [1892] A.C. at p. 38.

[4] [1901] A.C. 495.

[5] [1925] A.C. 700.

[6] [1892] A.C. 25.

[7] *Quinn* v. *Leathem*, *supra*, per Lord Brampton at p. 528.

844. The test applied, however, appears to have been, What was the over-ruling motive in the minds of the defendants—self-defence or attack, and, if attack, is that which is justifiable when done by an individual unjustifiable and malicious when done by a combination? As regards the latter question there has, as indicated above, been difference of judicial opinion. In the case of *Pratt* v. *The Bristol Medical Association*,[3] while considering the case of *Quinn* v. *Leathem*[4] it was stated that "the element of conspiracy seems to have been a merely incidental feature of that case." This view was rejected in a later case in which Atkin L.J. stated: "It appears to me to be beyond dispute that the effect of the two decisions in *Allen* v. *Flood*[5] and *Quinn* v. *Leathem*[4] is this: that on the one hand a lawful act done by one does not become unlawful if done with an intent to injure another, whereas an otherwise lawful act done by two or more in combination does become unlawful if done by the two or more in combination with intent to injure another."[6] This statement of the law was concurred in by Lord Dunedin in *Sorrell* v. *Smith*.[7]

845. It would, accordingly, appear that, in the case of an individual, malice is to be regarded as of no significance except in so far as it is found in conjunction with an act which is, in itself, a violation of the law, and, apart from crimes and a few cases of actionable wrongs, is of no legal effect as a ground of legal responsibility; that motive may be neglected as constituting an element of civil wrong; and that the proper function of malice is as a reply to be used to cut down justification or excuse when pleaded by the defender, or raised in his favour by the circumstances of the case. In the case, however, of an act done by a combination of persons it may be, despite opinions to the contrary, that malicious motive is of the essence of the wrong. The contrary view was expressed by the Lord Chancellor in *Sorrell* v. *Smith* in considering the proposition that a combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable. He said: "In some cases 'malice' is postulated as an element of the tort which I am considering. If the word means only that the act complained of is wilfully and knowingly done, or that it is done for the purpose of injuring another, then it is rightly used in this connection. But there is a tendency to interpret 'malice' as connoting personal enmity or spite or some other evil motive; and as such a motive is neither an essential element in the offence nor conclusive of the offence having been committed, it seems better to forego the use of the word." [1] The other view was forcibly expressed by Lord Dunedin: "I never held a clearer opinion than the one I now express that the effect of *Allen* v. *Flood* and *Quinn* v. *Leathem* is to settle beyond dispute that in an action against an individual for injury he has caused to the plaintiff by his action, the whole question is whether the act complained of was legal, and motive or interest is immaterial; but that, in an action against a set of persons in combination, a conspiracy to injure, followed by actual injury, will give a good cause for action, and motive or intent when the act itself is not illegal is of the essence of the conspiracy." [2] "How, then, can actual malice be excluded from the category of the motives, or indeed what other motive can there be in such a matter beyond selfishness and malice, except, indeed, mere irresponsible wantonness?" [3] In dealing with certain of the opinions in previous cases Lord Buckmaster, while expressly concurring in Lord Dunedin's views,[4] said: "Personally, I shall prefer in reaching the same goal to tread another path and to say that a combination having such a purpose (*i.e.* to injure another in his trade) was not illegal without motive, and that the *onus* is not on the defendant to justify but on the plaintiff to prove that the act was spiteful and malicious." [5]

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[1] [1892] A.C. 25. [2] *Sorrell* v. *Smith*, [1925] A.C. 700, per Lord Sumner at p. 742.

[3] [1919] 1 K.B. 244, per M'Cardie J. at p. 260.

[4] [1901] A.C. 495. [5] [1898] A.C. 1.

[6] *Ware and De Faville* v. *The Motor Association*, [1921] 3 K.B. 40, per Atkin L.J. at p. 90.

[7] [1925] A.C. at p. 719.

846. The effect of the earlier decisions, accordingly, as explained by the majority of the judges in *Sorrell* v. *Smith*, appears to be that, in cases of a combination to injure another in his trade, malicious conspiracy is at the root of the wrong and that malice will not be presumed but must be proved by the injured party, just as in cases of slander it is the duty of the person who avers malice in answer to a case of privilege to prove it. The more important authorities upon the topic of malicious conspiracy not already referred to in the text are stated below.[1]

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[1] *Sorrell* v. *Smith, supra*, per Lord Chancellor at p. 714.

[2] *Ibid.*, per Lord Dunedin at pp. 723, 724.

[3] *Ibid.*, per Lord Sumner at p. 739.

[4] *Ibid.*, per Lord Buckmaster at p. 749.

[5] *Ibid.*, per Lord Buckmaster at p. 748.

SECTION 4.—MALICE IN QUESTIONS OF MASTER AND SERVANT.

847. Malice may be relevantly averred against a company or corporation;[2] for a corporation which commits an actionable wrong is as liable therefor as a private individual if the thing done is within the purpose for which the corporation exists, and would have been actionable if done by an individual; and this principle has been held to extend to liability for malicious wrongs.[3] This view has been doubted by eminent authority,[4] but " it seems on principle that such an action will lie if the wrongful act was done by a servant of the corporation in the course of his employment and in the company's supposed interest, and it has been so held. Notwithstanding *dicta* to the contrary, it seems now practically certain that the action lies." [5]

848. A corporation cannot be held to be incapable of malice so as to be relieved of liability for malicious libel when published by its servant acting in the course of his employment.[6] This principle renders the principal liable in cases of verbal slander uttered by a servant or agent while in the course of his employment and for the benefit of his employer.[7] But the malice actuating the slander must be uttered directly in the interests of the master's business and must not be attributable purely to spite on the part of the servant or agent.[8] The general rule, however, is that malice is not vicarious,[9] and that, outside the special relationship of master and servant, no liability attaches to one person for the malice of another.[10]

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[1] *Lumley* v. *Gye*, 1853, 2 E. & B. 216; *Bowen* v. *Hall*, 1881, 6 Q.B.D. 333; *Templeton* v. *Russell*, [1893] 1 Q.B. 715; *Conway* v. *Wade*, [1909] A.C. 506; *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K.B. 600; *Larkin* v. *Long*, [1915] A.C. 814; *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A.C. 239; *White* v. *Ridley*, [1921] 1 Ch. 1; *Reynolds* v. *Shipping Federation*, [1921] 3 K.B. 40; *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.*, [1913] A.C. 781; *Kearney* v. *Lloyd*, 1890, 26 L.R. Ir. 268; *Scottish Co-operative Wholesale Society* v. *Glasgow Fleshers' Trade Defence Association* (O.H.), 1898, 35 S.L.R. 645; 5 S.L.T. 263; *Brown* v. *Mags. of Edinburgh*, 1907 S.C. 256, per Lord Kinnear at p. 268 *et seq.*

[2] *Gordon* v. *British and Foreign Metaline Co.*, 1886, 14 R. 75.

[3] *Green* v. *London General Omnibus Co.*, 1859, 7 C.B. (N.S.) 290; *Edwards* v. *Midland Rly. Co.*, 1880, 6 Q.B.D. 287; *Kemp* v. *Courage & Co.*, 1891, 7 T.L.R. 50; *Cornford* v. *Carlton Bank*, [1899] 1 Q.B. 392; aff. [1900] 1 Q.B. 22 (where the liability to the action was admitted by counsel for the defendant).

[4] *Abrath* v. *North-Eastern Rly. Co.*, 1886, 11 App. Cas. 247, per Lord Bramwell at p. 250.

[5] Pollock, Torts, p. 324.

[6] *Citizens' Life Assurance Co.* v. *Brown*, [1904] A.C. 423; *Fitzimmons* v. *Duncan and Kemp & Co.*, [1908] 2 Ir. Rep. 483.

[7] *Finburgh* v. *Moss Empires, Ltd.*, 1908 S.C. 928; cf. *Gorman* v. *Moss Empires, Ltd.*, 1913 S.C. 1.

[8] *Aiken* v. *Caledonian Rly. Co.*, 1913 S.C. 66.

[9] *Wilson* v. *Mackie*, 1875, 3 R. 18, per Lord Ardmillan at p. 20.

[10] *Barr* v. *Neilson*, 1868, 6 M. 651; *Baillie* v. *Chalmers*, 1791, 3 Pat. 213.

MALICIOUS INJURY.
MALICIOUS MISCHIEF.

See CRIME.

MALICIOUS PROSECUTION.

See ABUSE OF PROCESS.

MALITIA SUPPLET ÆTATEM.

See MAXIMS.

MALVERSATION.

See CRIME.

MANDATARY (JUDICIAL).

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SECTION 1.—GENERAL.

849. When any person residing abroad is a party to a litigation in this country he is required, as a rule, to sist a mandatary, *i.e.* to appoint a substitute who will act in his stead as a party to the cause. Such a mandatary differs from one to whom a mandate is given merely to sue or defend, the latter being no more than an agent for the litigant, and in no sense a party to the action. Since the Judgments Extension Act, 1868,[1] and the Inferior Courts Judgments Extension Act, 1882,[2] other parts of the United Kingdom have not been accounted foreign countries, and the Court will not order a person residing there, even if he is a foreigner, to sist a mandatary unless there are special circumstances, apart from the liability for expenses of process, which render such a course desirable.[3]

SECTION 2.—WHO MUST SIST.

850. The sisting of a mandatary is always a matter for the discretion of the Court,[4] but greater latitude is exercised when the absent party is defender than in the case of a pursuer.[5] A pursuer having established a *prima facie* case, was held not bound to sist a mandatary.[6] Diligence proceeds without a mandatary;[7] but if litigation should follow, the occasion for one arises.[8] In an action by partners or trustees, one of whom is abroad, the Court will not order a mandatary to be sisted for him, provided the others in this country combining in the action are solvent.[9] A defender will be allowed to appear and discuss preliminary

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GENERAL AUTHORITIES.—MacKay, Manual, pp. 235, 658; Maclaren, Court of Session Practice, p. 431; Lewis, Sheriff Court Practice; Wallace, Sheriff Court Practice, p. 215.

[1] 31 & 32 Vict. c. 54.

[2] 45 & 46 Vict. c. 31.

[3] *Lawson's Trs.* v. *British Linen Co.*, 1874, 1 R. 1065; *Dessau* v. *Daish*, 1897, 24 R. 976.

[4] *Lawson's Trs.*, *supra*; *Gordon's Trs.* v. *Forbes*, 1904, 6 F. 455.

[5] *Simla Bank* v. *Home*, 1870, 8 M. 781.

[6] *M'Lean* v. *M'Garvey*, 1908, 16 S.L.T. 174.

[7] *Lockhart* v. *Ferrier*, 1832, 11 S. 236; *Ewing* v. *Hare*, 1823, 2 S. 467.

[8] *Ross* v. *Shaw*, 1849, 11 D. 984.

[9] *Antermony Coal Co.* v. *Wingate & Co.*, 1866, 4 M. 544; *Morrison* v. *Hutton*, 1863, 4 M. 546.

pleas, *e.g.* want of jurisdiction and the incompetency of the action, without a mandatary.[1] A claimant in a multiplepoinding has been required to sist one.[2]

851. The necessity for a mandatary arises from residence abroad, not being a short and temporary absence from this country.[3] It is, therefore, an important element in considering whether the sisting of a mandatary should be ordered, that the litigant is a soldier who has gone abroad in the discharge of his duty,[4] or a sailor who has gone on a voyage and intends to return.[5] A bankrupt will not be exempted from such an order owing to his insolvency.[6] Consistorial actions do not form an exception to the rule for a litigant providing a mandatary,[7] although a wife residing abroad was not required to sist one in an action of divorce against her husband, a domiciled Scotsman,[8] nor was the husband in an action against his wife.[9] A litigant cannot keep his opponent abroad and prevent him coming to this country and at the same time require him to sist a mandatary.[10]

852. There is one important exception to the general rule. A litigant possessed of heritable estate in this country does not require a mandatary.[11] The title to the property must not be the subject in dispute between the parties,[12] and its value must be not insignificant, but reasonably sufficient to meet the expenses of process.[13] The fact that the party is within the British Dominions has been treated as a consideration against compelling him to sist a mandatary.[14]

SECTION 3.—HOW SISTING IS EFFECTED.

853. An action may be raised at the instance of A. B., pursuer, and C. D., his mandatary, or the mandatary may be sisted during the cause. Proceedings are not invalid owing to absence of a mandatary.[15] One party may at any stage of a case move for an order on his opponent to sist a mandatary; but when a pursuer appealed against a decree of absolvitor and moved for such an order on the defender, the Court refused the motion.[16] A refusal by the Court to order a sist is always *in hoc*

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[1] *D'Ernesti* v. *D'Ernesti*, 1882, 9 R. 655 ; *Clark* v. *Campbell*, 1873, 1 R. 281.

[2] *North British Rly. Co.* v. *White*, 1881, 9 R. 97.

[3] *Walkinshaw* v. *Stewart*, 1891, 18 R. 491.

[4] *Simla Bank* v. *Home*, 1870, 8 M. 781 ; *Graham* v. *Graham's Trs.*, 1901, 4 F. 1.

[5] *Buik* v. *Patullo*, 1855, 17 D. 568.

[6] *Overbury* v. *Peek*, 1863, 1 M. 1058.

[7] *Tingman* v. *Tingman*, 1854, 17 D. 122.

[8] *Campbell* v. *Campbell*, 1854, 17 D. 514 ; see *D'Ernesti*, *supra*.

[9] *Scott* v. *Scott*, 1924 S.C. 843 ; see *Taylor* v. *Taylor*, 1919, 1 S.L.T. 169.

[10] *Robertson* v. *De Salvi*, 1853, 19 D. 996.

[11] *Smith* v. *Norval*, 1828, 6 S. 852.

[12] *Sandilands* v. *Sandilands*, 1848, 10 D. 1091 ; *Lawson's Trs.* v. *British Linen Co.*, *supra*.

[13] *Fairlie* v. *Elliott*, 1839, 1 D. 399 ; *Caledonian and Dumbartonshire Rly. Co.* v. *Turner*, 1849, 12 D. 406.

[14] *Florence* v. *Smith*, 1913 S.C. 393 ; see, however, *Holmes* v. *M'Murrich*, 1920 S.C. 631.

[15] *Knight* v. *Freeto*, 1863, 2 M. 386.

[16] *Aitkenhead* v. *Bunton & Co.*, 1874, 19 R. 803 ; cf. *Buik* v. *Patullo*, *supra*.

statu, and the motion may be repeated.[1] When the order is made, a definite time is specified within which it must be obtempered, but the time may be extended owing to special circumstances.[2] The sisting is effected by lodging a minute signed by the proposed mandatary, upon which the Court pronounces an interlocutor sisting him as a party to the cause. Production of the mandate at the bar is not sufficient.[3] The minute is in this form: "A. B., above designed, hereby sists himself as mandatary for the pursuer (or defender) in said action." It is not necessary to lodge the mandate authorising the minuter to sist himself,[4] but this must be produced if demanded by the opposing party.[5] The minute must be unconditional.[6] A factory and commission or power of attorney authorising a person to sue and defend actions does not give power to sist a mandatary for the granter, but where the terms of the mandate are not general, but with reference to a specific action, the grantee may sist himself.[7]

SECTION 4.—HOW SISTING IS OBVIATED.

854. The necessity for sisting a mandatary may be obviated in various ways, *e.g.* by undertaking to reside in this country during the progress of the case,[8] or on finding caution to attend all the diets of Court;[9] but an offer to attend all or any of the diets if required, on getting reasonable notice, was held insufficient in another case.[10] When a pursuer appeared personally in Court, it was held incompetent to make an order on him.[11] A defender cannot claim exemption on consigning the sum sued for.[12] On a litigant who has sisted a mandatary coming to reside in this country, he may have the order to sist recalled.[13]

SECTION 5.—TERMINATION OF MANDATE.

855. The mandatary's office is brought to an end by his death or that of his constituent, or by his own insolvency.[14] The mandatary may resign his office at any time, but this cannot be done by giving notice to the other side; a minute should be lodged stating the mandatary's desire to resign, upon which the Court will grant leave.[1] Upon failure of one mandatary, another must be sisted.

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[1] *Aitkenhead* v. *Bunton & Co.*, 1874, 19 R. 803; *Walkinshaw* v. *Stewart*, 1891, 18 R. 491.
[2] *Murray* v. *Murray*, 1845, 7 D. 1000.
[3] *Thomson* v. *Woodthorpe*, 1863, 1 M. 635.
[4] *Elder* v. *Young & Co.*, 1854, 16 D. 1003.
[5] *Gunn & Co.* v. *Couper*, 1871, 10 M. 116.
[6] *Pease, Wrays & Trigg* v. *Smith & Jameson*, 1822, 1 S. 420; *Robertson & Co.* v. *Exley, Dimsdale & Co.*, 1833, 11 S. 320.
[7] *Dempster* v. *Potts*, 1836, 14 S. 521.
[8] *Faulks* v. *Whitehead*, 1854, 16 D. 718; *Bracken* v. *Blasquez*, 1891, 18 R. 819.
[9] *Earl of Hopetoun* v. *Horner*, 1842, 4 D. 877.
[10] *Railton* v. *Matthews*, 1844, 6 D. 1348; cf. *Nero* v. *Gunn & Cameron*, 1886, 2 S.L.R. 342.
[11] *Clarke* v. *Newmarsh*, 1836, 14 S. 488.
[12] *Brown* v. *Lindley*, 1833, 12 S. 18.
[13] *Bracken* v. *Blasquez*, *supra*.
[14] *Harker* v. *Dickson*, 1856, 18 D. 793; *Trodden* v. *Sweetman*, 1862, 24 D. 1360.

SECTION 6.—FAILURE TO SIST.

856. Failure to obtemper the order of the Court to sist a mandatary involves a decree of absolvitor,[2] or in terms of the conclusions of the summons, according as the failure is on the part of pursuer or defender; but this may not follow if a jury has tried the case and returned a verdict.[3]

SECTION 7.—WHO MAY BE MANDATARY.

857. The Court will not accept any person residing in this country who may be willing to act as mandatary. He must not be already a party to the cause, and therefore one of two defenders was not allowed to sist the other defender.[4] As insolvency of the mandatary terminates his mandate, a bankrupt will probably not be sisted even for a bankrupt litigant.[5] But it is not a valid objection that the person offering himself is unable to pay the expenses of process. All the Court requires is that he shall be solvent and ostensibly of the same rank as the party for whom he agrees to act.[6] An English mandatary has been accepted in the Scots Courts.[7]

SECTION 8.—LIABILITIES AND POWERS OF MANDATARY.

858. The powers and liabilities of a mandatary depend of course on the nature of his position in the process. "As regards the merits he is a mere representative, but he is personally answerable for all the other conditions of the contract of litiscontestation. He is liable to implement any order the Court may pronounce in regulating the conduct of the process; he is personally liable for fines, and for expenses which may be found due in the course of the process; and he is personally liable for the whole expenses of the process.[8] "One object of having a mandatary," said Lord Deas, "is to get a person who shall be liable in the expenses of the cause. Another is to secure a person who shall be responsible to the Court for the proper and decorous conduct of the cause. A third is, that if there be no mandate under the hand of the mandant, the proceedings may go on for years in his absence, and he may in the end disclaim the whole of them in respect he never authorised them." [9] And

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[1] *Neilson* v. *Wilson*, 1822, 1 S. 348; *Martin* v. *Underwood*, 1827, 5 S. 783.

[2] *Train* v. *Little*, 1911 S.C. 736.

[3] *Trodden* v. *Sweetman*, *supra*.

[4] *Barstow* v. *Smith*, 1851, 13 D. 854.

[5] *Overbury* v. *Peek*, 1863, 1 M. 1058, per Lord Deas.

[6] *Overbury*, *supra*; *Scott* v. *Gillespie*, 1823, 2 S. 149; *Duncan* v. *Duncan*, 1830, 8 S. 641; *Stephenson* v. *Dunlop*, 1841, 4 D. 248; *M'Kinlay* v. *M'Kinlay*, 1849, 11 D. 1022; *Railton* v. *Mathews*, 1844, 7 D. 105.

[7] *Goodhall* v. *Mackill*, 1891, 8 S.L.R. 40; *Blow* v. *Ecuadorian Association*, 1902, 5 F. 444.

[8] *Renfrew & Brown* v. *Mags. of Glasgow*, 1861, 23 D. 1003, per Lord Justice-Clerk Inglis.

[9] *Gunn & Co.* v. *Couper*, 1871, 10 M. 176.

Lord Ardmillan said in the same case: "The theory is, not that the mandatary is a substitute for his mandant, but that the opposing party has the liability of both to rely on, and is entitled to that." His liability, then, is twofold. He is responsible to the Court for the due and proper conduct of the cause, and for obtempering the orders of Court. In this regard the mandatary represents within the jurisdiction the party who is beyond it.[1] He is also liable conjunctly and severally with his constituent, but with full relief, for the expenses of process found due to the opposite party, whether incurred prior to his being sisted or during the period when he held office.[2]

859. When he resigns, the date of tendering a minute of resignation fixes the term of his liability;[3] and when a mandatary has died, his estate is liable for expenses up to the date of death.[4] Mandataries withdrawing on the morning of the day when the case was going to trial by jury were found liable for necessary expenses incurred through them not withdrawing sooner.[5] A mandatary is not liable for expenses when his principal is on the poor-roll, but only for the proper conduct of the litigation;[6] and he is not liable for an interim award of aliment to a wife in a divorce case.[7] His liability for expenses does not determine through the opposing party insisting on his mandant, who had become bankrupt, finding caution for expenses.[8] The liability of a mandatary may be incurred by any person acting as such, although he held no mandate and may not have been properly sisted.[8]

860. A mandatary cannot compromise a case which he is authorised to sue;[9] nor when the action has fallen through, as by the death of the mandant and refusal of his representatives to sist themselves, can he carry it on, like an agent disburser, to the effect of having it found that no expenses are due.[10]

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[1] *Overbury* v. *Peek*, 1863, 1 M. 1058; *Railton* v. *Mathews*, 1844, 6 D. 1348, per Lord Justice-Clerk Hope.

[2] *Renfrew & Brown* v. *Mags. of Glasgow*, 1861, 23 D. 1003; *Erskine* v. *Walker's Trs.*, 1883, 10 R. 717.

[3] *Cairns* v. *Anstruther*, 1841, 2 Rob. 29.

[4] *Barclay's Reps.* v. *Barclay*, 1850, 12 D. 1253.

[5] *Chapman* v. *Balfour*, 1875, 2 R. 291.

[6] *Carling* v. *Campbell*, 1826, 4 S. 548; *Middlemas* v. *Brown*, 1828, 6 S. 511.

[7] *Webster* v. *Watson*, 1896, 33 S.L.R. 369.

[8] *Cullen* v. *Brown*, 1860, 22 D. 1090.

[9] *Thoms* v. *Bain*, 1888, 15 R. 613.

[10] *Gordon* v. *Gordon*, 1823, 2 S. 572.

MANDATE.

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SECTION 1.—DEFINITION.

861. Mandate is a consensual contract by which one person obliges himself to do an act or acts for another, or to manage the affairs of another. Erskine defines it as "that contract by which a person employs his friend to manage his affairs, or any branch of them." [1] "The contract of mandate, when understood strictly and in the sense of the Roman law, is grounded entirely on personal considerations of friendship, and was therefore always deemed a gratuitous contract." [2] *Mandatum nisi gratuitum in aliam formam negotii cadit.* In the strict acceptation of the term it is by the law of Scotland always gratuitous, although this does not exclude recompense for services in the form of *honoraria.* But the exigencies of commerce have caused mandate to be almost superseded by the onerous contract of agency, which, although resembling mandate and in many respects regulated by similar legal considerations, differs in some respects from the gratuitous contract. Where the right to payment is agreed upon or implied from the circumstances of the case, the subject has been treated in the article on AGENCY.[3]

862. The Romans were careful to distinguish mandate from mere advice, which, although acted upon, can involve the person who gave it in no legal responsibility towards the one to whom it was given.[4] Mandate is a binding contract imposing obligations upon both the parties to it—an obligation to act, and an obligation to relieve the actor. Stair [5] includes trust under mandate; but although the office of trustee is to carry out the directions of the truster, and is gratuitous, it seems better to consider the threefold relationship of truster, trustee, and beneficiary as something different from mandate. The most recent authoritative text-writer treats it as a quasi-contract distinct from but akin to mandate.[1]

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[1] Ersk. iii. 3, 31.

[2] Ersk. iii. 3, 32.

[3] See Vol. I. p. 194; see also ADVOCATE, etc., Vol. I. p. 172; FACTORY AND COMMISSION, Vol. VII. p. 66, *ante.*

[4] See Stair, i. 12, 1.

[5] i. 12, 17.

863. The person who undertakes to act under a mandate is called the mandatary; the granter of the mandate is called the mandant. No one can grant a mandate to another to act on behalf of a third person without a special authority to do so, nor to act for the sole behoof of the mandatary himself. Capacity to grant a mandate is co-extensive with capacity to act in one's own right on one's own behalf; capacity to act as mandatary is co-extensive with capacity to contract. See CONTRACT.[2]

SECTION 2.—CONSTITUTION.

864. The contract of mandate is entered into by offer and acceptance. "As the bare granting of a power to act can infer no obligation upon the person empowered, who is at liberty to refuse the office, this contract cannot be perfected till the mandatory has undertaken to execute the mandate, which he may do either by word, by writing, or by any deed which sufficiently discovers his resolution." [3] When authority is given by written instrument it may take the form of a FACTORY AND COMMISSION [4] or a Power of Attorney, but any grant of authority under the hand of the mandant is sufficient. A *falsa demonstratio* will not invalidate the mandate, nor will the fact that it is written partly on an erasure, provided the alteration has been made before delivery to the mandatary.[5] The mandate may be general or special. "If the powers are special, they form the limits of the authority. If general, they will be more liberally construed, according to the necessities of the occasion, and the material or ordinary or reasonable course of the transaction and usage of trade." [6]

865. Mandate may be proved *prout de jure*.[7] It may be implied from circumstances.[8] Thus a wife is *præposita negotiis domesticis* and entitled, by presumed mandate, to bind her husband for suitable furnishings to the family.[9] A course of conduct by a master, which is equivalent to holding out, may imply power in his servant to bind him without particular authority.[10] If a bill stamp is delivered signed, there may be implied authority to fill it up within a reasonable time with any sum the stamp will cover.[11] An advocate is presumed to have a mandate from anyone for whom he appears in Court.[12] This presumption has been said to be so strong that it is only to be rebutted by production of a disclaimer.[1] If the mandate is challenged opportunity to produce one within a reasonable time will be allowed.[2]

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[1] M'Laren, Wills, s. 1507 *et seq.*

[2] Vol. IV. p. 447, *ante.*

[3] Ersk. iii. 3, 31.

[4] Vol. VII. p. 66, *ante.*

[5] *Muir* v. *Thompson*, 1876, 3 R. (H.L.) 1.

[6] Bell, Com. i. 508; *Smith* v. *Harris*, 1854, 16 D. 727.

[7] *Corbet* v. *Douglas and Jarvie*, 1808, Hume, 346; *Mackenzie* v. *Brodie*, 1859, 21 D. 1048; *Annand's Trs.* v. *Annand*, 1869, 7 M. 526; *Ross* v. *Cowie's Exrx.*, 1888, 16 R. 224; Dickson on Evidence, s. 495.

[8] Cp. *Dickson* v. *National Bank of Scotland*, 1917 S.C. (H.L.) 50, with *Walker* v. *Smith*, 1906, 8 F. 619.

[9] Bell's Prin., 1565; see HUSBAND and WIFE, Vol. VII. pp. 676, 677, and 678, *ante.*

[10] *Oliver* v. *Grieve*, 1792, Hume, 319; *Dewar* v. *Nairne*, 1804, Hume, 340; *Morrison* v. *Statter*, 1885, 12 R. 1152.

[11] Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 20.

[12] Ersk. iii. 3, 33.

866. *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*—ratification or homologation of an act done, as on the authority of the person homologating, is tantamount to its having been done on his mandate.[3] But no one can do an act as mandatary for a mandant who does not come into existence until after the date of the performance by the alleged mandatary of the act said to be homologated. So it was held that a company could not sue on a contract made by an agent prior to its incorporation, there being no express assignation of the contract.[4]

867. An illegal or immoral act cannot be the object of a mandate; and there are many actions so personal to the one on whom the duty or right of performance is laid, that they cannot be done through the medium of another. Subject to these exceptions the rule may be stated as absolute, that whatever a person may do by himself in his own right he may do by another. And, on the other hand, the brocard *qui facit per alium per seipsum facere videtur* applies.

SECTION 3.—OBLIGATIONS ON MANDATARY.

868. The duty of a mandatary is to perform what he has undertaken in accordance with the instructions of the mandant. He must account for his intromissions, including any benefit or ease obtained; but he is liable in a less degree of diligence in carrying out the mandate than is a paid agent. All that is required of him is that, like a depositary, he should exercise such care and foresight as an ordinary man of business would employ in the conduct of his own affairs.[5] But if he undertakes a duty requiring professional skill *spondet peritiam*, and he is liable for the results of improper or unskilful work.[6] The mandatary must conform to the directions given by the mandant, and will be responsible for the consequences of acting *ultra fines mandati*.[7] A mandatary has all the powers implied in the necessity for carrying out the mandate. "Where you have a particular agent employed by a principal to perform a particular piece of business for him, he must act within the instructions given for the particular occasion, and does not bind his principal if he acts otherwise. If you have a general agent employed generally in his master's or his principal's affairs, or in a particular department, he is assumed to have all the authority which is necessary to enable him to serve his master as such general agent or general agent in a particular department." [8]

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[1] *Ogston* v. *Turnbull*, 1875, 13 S.L.R. 69.

[2] *Fischer & Co.* v. *Andersen*, 1896, 23 R. 395; *Ferguson, Davidson & Co.* v. *Paterson & Dobbie*, 1898, 1 F. 227.

[3] Ersk. iii. 3, 47; Bell, Com. i. 139; see HOMOLOGATION, Vol. VII. p. 623, *ante*.

[4] *Tinnevelly Sugar Refining Co.* v. *Mirrlees, Watson & Yaryan Co.*, 1894, 21 R. 1009.

[5] Bell's Prin., s. 218; *Anderson*, 1583, Mor. 10082; *Grierson* v. *Muir*, 1802, Hume, 329; *Copland* v. *Brogan*, 1916 S.C. 277.

[6] Bell's Prin., s. 218.

[7] *Paisley* v. *Rattray*, 1779, Mor. 8492; *M'Neil, Rowan, etc.* v. *Dawling*, 1696, Mor. 10085.

[8] *Morrison* v. *Statter*, 1875, 12 R. 1152, per Lord Young at p. 1154.

869. A mandatary who exceeds his commission will not bind the mandant; but even although ostensibly contracting in a representative capacity, the mandatary, who has in fact exceeded the terms of his mandate, may be liable to the party with whom he has dealt on the ground that he warranted his authority. The liability is for damages for breach of warranty, not for implement of the contract.[1] If the terms of the contract are such as to infer personal liability on the part of the mandatary, he will of course be liable for implement, but otherwise he does not necessarily render himself liable to third persons (an exception being recognised in the case of a mandatary in judicial proceedings). A railway passenger who hands the ticket of a fellow-passenger to a ticket-collector does constitute himself a mandatary to the effect of becoming liable to any penalty for fraud committed on the railway company by that person; and may not thereby incur any liability whatever.[2] In the case of two or more mandataries, their power must, in the absence of other direction, be exercised jointly, and they are liable to their mandant *in solidum.*

870. A mandatary cannot without express power delegate his authority—*delegatus non potest delegare.* But this rule does not hold when usage of trade or professional custom prescribes a contrary practice, or when the power conferred requires for performance, in whole or in part, skill not professed by the mandatary. The nature of the mandate and usage of trade will show the necessity for a devolution of authority. If there is a competent delegation, the mandatary is only liable for his *bona fides* in selecting a sub-agent.

SECTION 4.—OBLIGATIONS ON MANDANT.

871. As the mandatary is bound to account to his mandant for any moneys received from him, he is entitled also to be reimbursed any expenses he may have *bona fide* incurred in carrying out the mandate, with interest. When the outlays are caused by payment of tradesmen's accounts, his claim will not fall by the triennial prescription.[3] The other obligation on the mandant is to relieve his mandatary of any liability he may have required to incur. Two or more mandants are liable to their mandatary *in solidum*, but employment of each must be clearly proved.[4]

SECTION 5.—TERMINATION OF MANDATE.

872. The contract is brought to an end (1) by revocation by the mandant, whether actual or constructive, intimated to the mandatary:[5] but the mandant is not entitled to revoke *intempestive*, *i.e.* when the mandatary will suffer injury thereby, as by the matter being in course of execution; (2) by renunciation on the part of the mandatary;[1] (3) bankruptcy of the mandatary, and usually, but not necessarily, by the bankruptcy of the mandant;[2] (4) by the death of either party, which puts an end to mandate. A mandatary, however, is entitled to proceed with the execution until the mandant's death has been sufficiently made known to destroy his *bona fides* in continuing to act,[3] or in completing an act after he is aware of that event; (5) by insanity of the mandant, which if not slight and temporary in its character[4] has the same effect as his death. Third parties contracting with the mandatary in *bona-fide* ignorance of the insanity will not be deprived of their claim against the mandant's estate on the ground that "the acts of the mandatary must be binding on the mandant till the mandate is formally recalled, at least so long as the contracting parties are ignorant of any change of circumstances";[5] (6) by performance of the special act for which a mandate was given.

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[1] Bell, Com. i. pp. 543, 544 n.; *Collen* v. *Wright*, 1857, 8 E. & B. 647; *Anderson* v. *Croall*, 1903, 6 F. 153.

[2] *Harris* v. *North British Rly. Co.*, 1891, 18 R. 1009.

[3] *Saddler* v. *M'Lean*, 1794, Mor. 11119; *Grant* v. *Fleming*, 1881, 9 R. 257.

[4] *Smith* v. *Harding*, 1877, 5 R. 147.

[5] Ersk. iii. 3. 40.

SECTION 6.—PROXY.

SUBSECTION (1).—*Definition.*

873. The word "proxy" is used in a double significance, and may refer either to a special form of mandatary, or to the mandate under which he acts. It is used to denote (1) a person appointed to represent and vote for another at a meeting or meetings; (2) the instrument by which such an appointment is made. The commonest context in which the word is used is in the affairs of joint stock companies. There is no common law right on the part of a member of a corporation to vote by proxy.[6] In every instance such right must depend for its existence either upon statute (*e.g.* the Bankruptcy (Scotland) Act, 1913,[7] empowering creditors in bankruptcy proceedings to vote by mandataries), or contract (*e.g.* a limited company's articles of association), or special custom.[8] Formerly members of the House of Lords were entitled to vote on divisions by proxy, but a Standing Order was made on 31st March 1868, that "the practice of calling for proxies on a division shall be discontinued." In the election of the sixteen Scottish Representative Peers, votes may be given either in person or by proxy, and special rules for such votes are enacted.[9]

SUBSECTION (2).—*Form of Proxy.*

874. As a general rule, the instrument by which a proxy is appointed does not require to be in any special form. It ought, however, to be signed, but need not be either holograph or tested.[1] It may be "general" or "special," according as it authorises the appointee to vote at every meeting, or only at a particular meeting or meetings.

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[1] Ersk. iii. 3, 40.

[2] *MacKenzie* v. *Campbell*, 1894, 21 R. 904; but see Bell's Com. i. 525.

[3] *Campbell* v. *Anderson*, 1829, 3 W. & S. 384.

[4] *Wink* v. *Mortimer*, 1849, 11 D. 995.

[5] *Pollok* v. *Paterson*, 10th December 1811, F.C., per Lord Justice-Clerk Boyle.

[6] *Harben* v. *Phillips*, 1883, 23 Ch. D. 14, per Bowen L.J. at p. 35.

[7] 3 & 4 Geo. V. c. 20, s. 59.

[8] *Robertson* v. *Murdoch*, 1830, 8 S. 587.

[9] 6 Anne, c. 23, ss. 4, 5, 6.

SUBSECTION (3).—*Stamps on Proxies.*

875. In general proxies require to be stamped,[2] the stamp being one penny when the authority is given to vote at one meeting or any adjournment thereof, and ten shillings when authority is given to vote at more than one meeting. There are, however, statutory exemptions to the necessity for stamping, *e.g.* proxies appointed to vote in bankruptcy proceedings.[3] Every letter or power of attorney appointing a proxy to vote at a meeting, and every voting paper, charged respectively by the Stamp Acts with the duty of one penny, must specify the day of the meeting, and is only available at that meeting and any adjournment thereof. As to the meaning of the word "adjournment" and the effect of an erasure in the date of meeting, see *Muir* v. *Thompson.*[4] Provided, however, a proxy be stamped with a penny stamp on execution, the date of execution and the date of the meeting at which it is to be used may be filled in afterwards by any person duly authorised by the giver of the proxy to do so, even though at the time of execution the date of the meeting has not been fixed;[5] and proxies were held valid where a notice calling a meeting, with a form of proxy attached, was sent out with the date of meeting blank and where the proxies (duly stamped) were returned with the blanks unfilled and the blanks were then filled up by the secretary before the proxies were lodged with the company.[6]

SUBSECTION (4).—*Who may Appoint and who may be Appointed Proxy.*

876. A corporation entitled to hold shares in another company has the same right of voting by proxy as any other member.[7] One partner may appoint a proxy on behalf of a private company of which he is a partner.[8] A creditor may appoint several persons as proxies for separate debts,[9] or he may make a joint appointment for the same debt.[10] Where a proxy is personally interested in the result of a resolution, as by way of obtaining remuneration or a pecuniary benefit out of a bankrupt's estate otherwise than as a creditor rateably with other creditors, it is thought that, on the ordinary principles of trust, his vote would be rejected.[11] The trustee in a sequestration cannot,[12] but a commissioner may act as a proxy.[13]

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[1] *Scudamore* v. *Lechmere*, 1797, Mor. 8559.

[2] Stamp Act, 1891 (55 & 55 Vict. c. 39), s. 80.

[3] Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), s. 189.

[4] 1871, 10 M. 178; 1876, 3 R. (H.L.) 1.

[5] *Sadgrove* v. *Bryden*, [1907] 1 Ch. 318.

[6] *Ernest* v. *Loma Gold Mines, Ltd.*, [1896] 2 Ch. 572; [1897] 1 Ch. 1.

[7] *In re India Zoedone Co.*, 1884, 26 Ch. D. 70, per Lord Selborne L.C. at p. 78.

[8] *Turnbull* v. *Smellie*, 1828, 6 S. 676.

[9] *Clark* v. *Mitchell*, 1847, 9 D. 399.

[10] *Forrest* v. *Borthwick*, 1848, 11 D. 308.

[11] Goudy on Bankruptcy, 4th ed., p. 193.

[12] *Witham* v. *Treenan's Tr.*, 1884, 11 R. 776.

[13] Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), s. 72.

SUBSECTION (5).—*Powers of the Proxy.*

877. The powers of the appointee depend upon the terms of the instrument of appointment. As a rule, they must be strictly adhered to.[1] It is not competent to prove by parole evidence that a mandate was granted for a special purpose not apparent from the terms of the mandate itself.[2] A mandate to "vote and act at all meetings under the sequestration" was held not to entitle the mandatary to prosecute an appeal to the Court of Session against a deliverance of the Sheriff.[3] A mandate "to attend all meetings of the creditors, particularly any meeting which may be held for determining upon any offer of composition, and to vote and act for me thereat as you may think proper," did not entitle the mandatary to execute a deed in favour of the person proposed as cautioner for the composition, whereby the latter was practically released from any obligation.[4] On the other hand, a mandate in a sequestration empowering the mandatary "to attend, act, and vote at all meetings in the sequestration," is not restricted to meetings only, but includes all competent acts in the course of the sequestration, and therefore admits of concurrence being given to a petition for discharge, though not given at a meeting.[5] In *Barclay* v. *Glendronach Distillery Co.*[6] a mandate in a sequestration "to act and vote at all meetings in the sequestration" was held (*diss.* Lord President Inglis) sufficient, in the circumstances of the case, to entitle the mandatary to bind his principal to pay his share of the expenses of a litigation. A mandate to A. to appear and object to the granting of a licence "at the forthcoming Licensing Court" was held to apply to the Licensing Court only and not to the Appeal Court.[7] The Bankruptcy Act, 1913, s. 2, defines "vote" as including "a consent to any offer of composition and to discharge of the debtor, and also a dissent from such offer or discharge." A mandatary may put questions at the public examination of the bankrupt.[8] Generally speaking, it may be said that narrow and technical objections to the votes of proxies in sequestrations will not be countenanced by the Court where the facts and circumstances show *bona fides*, and there can be no reasonable doubt as to the authority of the person presenting the mandate.[9]

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[1] *Muir* v. *Thompson*, 1876, 3 R. (H.L.) 1; Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), s. 59.

[2] *Thompson* v. *Muir*, 1871, 10 M. 178.

[3] *Ewing* v. *Watson*, 1860, 22 D. 354.

[4] *Morrison* v. *Balfour*, 1849, 11 D. 653.

[5] *Buchanan* v. *Wallace*, 1882, 9 R. 621.

[6] 1868, 7 M. 9.

[7] *Goodall* v. *Bilsland*, 1909, S.C. 1152.

[8] *Smyth* v. *M'Lelland*, 1843, 6 D. 331.

[9] *Turnbull* v. *Smellie*, 1828, 6 S. 676; *Dyce* v. *Paterson*, 1846, 9 D. 310; *Dods* v. *Ireland*, 1847, 9 D. 1419; *Morrison* v. *Balfour*, 1849, 11 D. 653.

MANIA.

See INSANITY AND LUNACY.

MANSE.

See CHURCH.

MANSION HOUSE.

See ENTAIL; TERCE.

MANSLAUGHTER.

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MAPS AND PLANS.

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MARITIME LIENS.

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SECTION 1.—INTRODUCTORY.

878. A lien at common law is dependent on continuing possession. A lien by the law maritime is really an hypothec, and is indefeasible by change of possession or even by transfer of property. "The position of a creditor who has a proper maritime lien differs from that of a creditor in an unsecured claim in this respect—that the former, unless he has forfeited the right by his own laches, can proceed against the ship notwithstanding any change in her ownership, whereas the latter cannot have an action *in rem* unless at the time of its institution the *res* is the property of his debtor."[1] The law of maritime liens, as in other branches of Admiralty, is the same in Scotland as in England.[2]

879. Maritime liens are created by: (1) Bottomry. (2) Respondentia. (3) Collision causing damage (see also as to loss of life). (4) Salvage services. (5) Seamen's contract of service (for wages and victualling allowances due thereunder). (6) Master's contract of service (for wages due thereunder). (7) Master's disbursements when properly incurred on account of his ship. There is perhaps also a maritime lien created by pilotage services.[3] There is no lien for towage. There is no maritime

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GENERAL AUTHORITIES.—Maclachlan, Law of Merchant Shipping, 6th ed.; Abbott, Merchant Ships, etc., 14th ed.

[1] *The "Henrich Björn,"* 1886, 11 App. Cas. 270, per Lord Watson at p. 277.

[2] *Currie* v. *M'Knight*, [1897] A.C. 97; 24 R. (H.L.) 1.

[3] See Abbott, Merchant Ships, etc., 14th ed., p. 1012; Maclachlan, Law of Merchant Shipping, 6th ed., p. 570.

lien conferred on a necessaries-man by supplying necessaries to a ship.[1] It was decided in the case of *Wood* v. *Hamilton* [2] that no lien was created by supplying necessaries to a Scottish ship in a home port; and in the case of *The "Henrich Björn"* [3] that no maritime lien arose in England in respect of disbursements for necessaries made to a Norwegian ship in the port of Liverpool. It was decided also in *Clydesdale Bank* v. *Walker & Bain* [4] that no lien was created for any disbursements made on account of a Scottish ship in a home port even when made by the master, as such disbursements are not properly made by him on account of his ship within the meaning of s. 167 (2) of the Merchant Shipping Act, 1894. In *Constant* v. *Christensen* [5] Lord Dewar refused to recognise a lien as existing over a Russian vessel for necessaries supplied by a merchant in Copenhagen.

SECTION 2.—BOTTOMRY.

SUBSECTION (1).—*Definition.*

880. Bottomry creates a maritime lien. It may be defined as the contract by which the master or owner of a ship hypothecates the ship and its appurtenances in security of money advanced to enable the ship to prosecute her voyage, the claim of the lender being made contingent on the arrival of the vessel, and the lender's risk being (usually) compensated by a high rate of interest on the loan. In order to be effectual, the contract must be in writing, but there is no settled form of the instrument, although in practice it usually takes the form of a bond or bill. The document must set out the amount advanced and the premium or interest payable; it must describe the subject or subjects hypothecated, and specify the date after the arrival of the vessel when the stipulated sum becomes due. Provided these things appear in the bond, even although it contain other conditions which are radically vitious, it will be sustained.[6] In a case in which the document, although called bottomry, did not state either the voyage on which the maritime risk was to be run or the time when the loan was to become repayable, the Court held that there was no valid contract of bottomry.[7] The bond should also, as matter of good conveyancing, set forth in the narrative, especially in those cases where the master is the borrower, the circumstances which have given rise to the contract, and the necessity for the loan in respect of which the bond is granted.

SUBSECTION (2).—*Maritime Interest.*

881. Repayment of the amount advanced on bottomry being contingent on an event which may be defeated by the perils of the sea, it has always been usual to stipulate for a high rate of interest, to compensate the lender for the risk. The interest so stipulated for was known as maritime interest, and was legally exigible even while the usury laws prevailed. The English Admiralty Courts, however, exercised an equitable jurisdiction in reducing the amount when it was unconscionable, on the same principle as they may decline to give effect to an agreement for payment of salvage. Quite a usual rate of interest when such contracts were common was 30 per cent. on the sum advanced, a premium which seems large, but was probably not much out of proportion to the risk incurred. In addition to the total loss of the ship, which put an end to the lender's claim, he ran the risk of the vessel reaching her destination, but in such a condition as to be practically worthless, or of her having put into an intermediate port and borrowed fresh money upon bottomry, which ranked preferably to the earlier bond on the security subjects. Besides all these risks, claims of salvage, for wages of the crew, and (by British maritime law) for damages caused by collision, all took precedence of the claims of the bottomry bondholder on the proceeds of the ship. On the other hand, the doctrine of constructive total loss was never recognised in connection with bottomry bonds. If the ship continued to exist *in specie*, however shattered and depreciated, the claim of the bondholder could be made effectual, although its recovery was imperilled by the partial loss of the security-subjects.[1] Even if the vessel never reached her destination, the bondholder could in some cases enforce his claim under the bond, *e.g.* where the vessel had been sold at an intermediate port, or had been lost through an unauthorised deviation of the voyage; in short, in every case where the completion of the voyage was prevented by the wilful or negligent act of the master or owner.[2] A bottomry bondholder might also recover the amount he had advanced from a wrongdoing vessel which had sunk the security vessel on the voyage contemplated in the bond, or where the wrongdoer admitted his liability and raised proceedings to have the amount payable limited under the Merchant Shipping Acts, the bondholder ranked for the amount contained in his bond.[3]

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[1] *Westrup* v. *Great Yarmouth Steam Carrying Co.*, 1889, 43 Ch. D. 241; and see per Lord Bramwell in *The "Henrich Björn," supra*, at p. 283.

[2] 1788, Mor. 6269; affd. 1789, 3 Pat. 148.

[3] 1886, 11 App. Cas. 270.

[4] 1926 S.C. 72.

[5] 1912 S.C. 1371.

[6] *Miller & Co.* v. *Potter, Wilson & Co.*, 1875, 3 R. 105.

[7] *The "James W. Elwell,"* [1921] P. 351.

882. The mere fact that interest is not stipulated for in the bond does not affect its validity, if it be clear from the terms of the deed that payment of the principal sum advanced is made contingent on the arrival of the ship;[4] but *in dubio* the absence of any clause providing for interest would go to help the construction that the lender did not intend repayment of the sum advanced to depend on any such contingency, a construction which would be fatal to the validity of the bond.[5] Interest is due from the date when the bond is payable, both on principal and premium, but the Admiralty Court has fixed the rate exigible at 4 per cent.[6]

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[1] *Stephens* v. *Broomfield*, 1869, L.R. 2 P.C. 516.

[2] Abbott, Merchant Ships, etc., 14th ed., p. 212.

[3] *The "Empusa,"* 1879, 5 P.D. 6.

[4] *The "Haabet,"* [1899] P. 295.

[5] *Miller & Co.* v. *Potter, Wilson & Co.*, 1875, 3 R. 105.

[6] Maclachlan, Merchant Shipping, 6th ed., p. 44 n.

SUBSECTION (3).—*Bonds by Owners.*

883. Bonds of bottomry granted by the owner or owners of a ship present few points upon which it is necessary to enlarge; indeed, such bonds, although at one time common enough when freights were high relatively to the value of the vessels employed, and commerce as yet undeveloped, have become practically obsolete. Where an owner or part owner of a ship now requires to raise money on the security of his property, he generally does so by mortgage under the provisions of the Merchant Shipping Acts. The security to the lender in such a case is more complete, and not subject to the same contingencies as apply to bottomry. The rate of interest exacted is also correspondingly lower.

SUBSECTION (4).—*Bonds by Master.*

884. Such importance as the subject still possesses is therefore confined to cases where the master of a ship has subscribed a bond of bottomry. His power validly to hypothecate the ship and freight, although he is himself in no way interested as part owner, has always been recognised, but it is subject to the strictest limitations. Even a mortgaged ship can be hypothecated by bottomry.[1] The Courts have always jealously protected the property of shipowners from being impledged in a foreign port by the shipmaster, unless where the debt has been incurred in their interests. Accordingly, it almost goes without saying that a shipmaster is not entitled to grant a bottomry bond over the ship and freight for a debt of his own; and even where the bond is executed for the purpose of securing a debt due by the owner, its validity will not always be sustained.

(i) *Essentials to Validity.*

(*a*) *Communication with Owners.*

885. Before hypothecating the ship under such a contract as bottomry, the master must communicate with the owners, if it is at all practicable for him to do so; and no bottomry bond will be sustained where this has not been done. The reason of the rule is that, as the maritime interest usually stipulated will absorb a large proportion of the profits of the voyage, the master is not entitled to have recourse to an exceptional expedient for raising money, without giving his owners an opportunity of raising the necessary funds on cheaper terms. Where the master can communicate by telegraph, he must avail himself of that medium; but where no telegraphic communication exists, "if it be rational to expect that he may obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken that it is his duty to do so, or at least to make an attempt."[1] Even if the owner be insolvent, the master must communicate with him before he is entitled to grant a bottomry bond; and if the owner is bankrupt, the communication must be made to his trustee.[2] It is to this rule, now firmly settled in British maritime law, that the diminished importance of bottomry bonds is mainly due. With the enormously improved methods of communication, the master is now rarely placed in circumstances in which he cannot communicate with the owners before requiring to raise money on bottomry. Their express consent, when given, will avoid many of the questions which might otherwise arise; and in the event of their express refusal, no valid bond could be granted by the master.

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[1] For the reason for this see *The* "*Ripon City,*" [1897] P. 226, at p. 244, per Lord Gorell, then Barnes J.; see also *The* "*St. George,*" [1926] P. 217.

886. Cases, however, may still arise, in connection with distant or little-frequented ports, where the master's power to hypothecate the ship and freight by means of a bottomry bond requires to be considered. The common case is that of a vessel driven by stress of weather into some foreign port, which she is unable to leave without undergoing repairs, or obtaining fresh provisions for the crew. The master has, as a rule, no funds at his own disposal, and no credit upon which he can obtain advances. His only course is to hypothecate the ship in security of such advances as are necessary to enable him to prosecute the voyage, and such hypothecation will, in the general case, be greatly in the interests of the shipowner, as presenting the only alternative to a sale of the ship. In the days when money could not be remitted by telegraph, and when the only communication between foreign countries was maintained by means of sailing ships, the necessity of conferring such powers on the captain was fully appreciated; and Lord Stowell considered that, in the interests of commerce, bonds of this kind should be regarded as of a high and privileged nature, and upheld with a very strong hand.[3] Under the altered conditions of commerce, these observations can apply only to a very limited class of cases.

(*b*) *Loan must be Necessary.*

887. The foundation of the master's authority in all such cases is necessity.[4] The advances in respect of which the bottomry bond is granted must be advances without which the voyage could not be prosecuted. This implies that the advances could not have been obtained in any other way less burdensome to the owner than on a contract of bottomry. If, for instance, the master can obtain a loan on the credit of his owners, or upon a bill drawn by him on his owners, or even on his own credit, he is not entitled to hypothecate the ship or freight. But it is not necessary that the advances should be required in order to fit the ship for the prosecution of the voyage. If, for instance, the ship has been attached for debt, and its release cannot be obtained without borrowing money on bottomry, the master is entitled to grant a bottomry bond in consideration of the advances.[1] But a debt of the owners, if it would not enable the creditor, in the particular port in which the ship happens to be, to arrest the ship, is not a good subject of bottomry; nor will the arrest of the master for his owner's liability give him the necessary authority, for even if he were arrested, the creditor could not thereby detain the ship. It follows from this, that if supplies have already been furnished on the personal credit of the owners, the master is not entitled to grant a bottomry bond for the amount. Apparently, in such a case, it would be the master's duty to endeavour to commence the voyage before the creditor could take proceedings to arrest the ship; and no mere threat of such proceedings would justify the granting of a bottomry bond, unless it were certain that they would be carried into effect in time to prevent the ship's departure.

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[1] *The* "*Oriental,*" 1851, 7 Moo. P.C.C. 398; *Kleinwort* v. *Cassa Marittima of Genoa,* 1877, 2 App. Cas. 156.

[2] *The* "*Panama,*" 1870, L.R. 3 P.C. 199. As to the right of a prior mortgagee to notice of intention to grant a bottomry bond, see *The* "*St. George,*" [1926] P. 217.

[3] *The* "*Alexander,*" 1812, 1 Dod. 278.

[4] *The* "*Karnak,*" 1869, L.R. 2 P.C. 505, at p. 513.

(ii) *Lender's Duties.*

888. The authority of the master being thus limited, the prudent lender on bottomry will, in his own interest, make inquiries both as to the purpose for which the advance is desired, and the impossibility of the captain obtaining it upon less onerous terms. If, however, the money is required for repairs or outfit, and cannot be otherwise raised, the lender on bottomry is not bound to see to its proper application,[2] nor to secure that the whole of it is expended for the benefit of the ship. Where the lender is the agent of the shipowner, the transaction will be more strictly inquired into than when he is a stranger.[3] But even a managing owner who is also a director of the company owning the ship can make valid advances on bottomry.[4]

(iii) *Personal Obligation on Master or Owners.*

889. On the subject of the rights and responsibilities arising on a contract of bottomry entered into by a master, there is a singular conflict of opinion. Erskine lays it down that it imposes no personal obligation upon the borrower.[5] On the other hand, Bell, in his Commentaries, is equally clear the other way. A bond of bottomry over the ship, he says, "of course binds the ship and owners without any qualification."[6] And again, in dealing with Erskine's view—which he alleges to be contrary to all the authorities—he asserts that the controversy in other countries has been whether it creates any other than a personal obligation. On the other hand, Lord Tenterden, in speaking of the power of the master to pledge the ship by a bond of bottomry, remarks: "Where this is done, the owners are never personally responsible; the remedy of the lender is against the master or the ship." This latter view seems to be in accordance with the bulk of the authorities, both in Scotland and in England.[1] The conflict between Bell and Erskine is probably in part due to their having in view bonds in different forms. If the bond contains no personal obligation on the borrower, it is difficult to see how one will be implied; and again, if the master or owner personally binds himself for repayment of the advance and premium, there is no reason why the obligation should not be enforced. The former view has been given effect to both in England and America.[2] Even Lord Tenterden's rule must, it is thought, be confined to cases where it has not been practicable for the master to communicate with the owners. In such cases, whether he binds himself personally or professes to bind only his owners, the master alone will be bound; but upon what principle he should be held liable when he is acting upon the direct instructions of his principal, and does not agree to be personally bound, it is not easy to see. Perhaps the master's responsibility may be justified on the footing that it operates as a restraint on his power of hypothecating the property of the shipowner; but it seems contrary to justice that, if money has been properly borrowed by the master for his owner's benefit, his estate should be liable (apart from express stipulation) to make good any deficiency which may be caused by subsequent perils to which the vessel has been exposed.

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[1] *The* "*Prince George*," 1842, 4 Moo. P.C.C. 21; but see *The* "*Ida*," 1872, L.R. 3 A. & E. 542.

[2] *The* "*Jane*," 1814, 1 Dods. 461, at p. 464; *The* "*Gratitudine*," 1801, 3 C. Rob. 257, at p. 272.

[3] *The* "*Royal Stuart*," 1855, 2 Spinks Ad. & Ec. 258, per Dr. Lushington.

[4] *The* "*St. George*," [1926] P. 217.

[5] Ersk. Inst. iii. 3, 17.

[6] i. 580.

SUBSECTION (5).—*Mode of Enforcing Bond.*

890. The ordinary mode of enforcing a bottomry bond is by an action of declarator of lien over the ship, followed by conclusions for sale of the ship and the application of the proceeds towards the debt of the bondholder. After the vessel has been sold and the proceeds consigned, the Lord Ordinary usually orders claims to be advertised for, and, in the event of competing claims being lodged, the action is practically converted into a multiplepoinding, and a record made up on the condescendence and claims in the usual way. Where the action is laid upon a bottomry bond granted by the master, for which the owners are not personally liable, there may be difficulty in securing the ship by arrestment in the ordinary way. In such circumstances the Court will grant a special warrant to arrest on a petition being presented to either Division.[3]

SUBSECTION (6).—*Law Applicable.*

891. As the laws of the different maritime nations vary considerably as to the prerequisites of valid bottomry (the British law being, in this respect, most stringent), it is of importance to know according to what law the validity of a bond granted in one country and payable in another falls to be determined. This was settled in the important case of *Lloyd* v. *Guibert*,[1] where it was held that the law of the flag must in all cases be applied. The principle of this decision is, "that the flag of the ship is notice to all the world that the master's authority is that conferred by the law of that flag, that his mandate is contained in the law of that country, with which those who deal with him must make themselves acquainted at their peril." This may operate somewhat hardly on the bondholder, who, at most, is expected to be acquainted with the law of his own country; but it must now be taken that the risk of his making a mistake as to the law applicable to the foreign shipmaster is just one of the risks to be compensated, like the others, by the maritime interest exacted.

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[1] *Cochrane* v. *Gilkison*, 1854, 16 D. 548; *Stainbank* v. *Shephard*, 1853, 13 C.B. 418; *The* "*Ripon City*," [1897] P. 226, 243.

[2] *The* "*Salacia*," 1862, Lush. 545, 548; *The Bark* "*Irma*," 1872, 2 Asp. M.C. N.S. 155.

[3] *Lucovich, Petr.*, 1885, 12 R. 1090.

Subsection (7).—*Bonds over Freight.*

892. In the foregoing remarks attention has been confined to a bottomry bond over the ship alone. As a rule, however, such bonds also include the freight; and it may be laid down as a general rule, that wherever the master may pledge the ship, he may also pledge the freight. From the freight payable at the end of the voyage, the charterer is entitled, as in a question with the bondholder, to deduct any advances made under any *bona fide* arrangement for forehand payment before the bottomry is required.[2] Where the ship and freight are insufficient security, the master may—under certain circumstances—hypothecate the cargo along with the ship and freight. The instrument by which this is done is known as a bond of bottomry and respondentia. The rules affecting the validity of such a bond, so far as the cargo is concerned, are somewhat special, and are given separate treatment below.

Section 3.—Respondentia.

Subsection (1).—*Definition.*

893. Respondentia is a contract for a "loan of money secured upon the merchandise laden, or to be laden, on board a ship, repayment thereof, with maritime interest, being made contingent on the arrival of the cargo at the port of destination." [3] The early history of the contract is obscure, but it is of very ancient date. In its nature it is similar to the contract of bottomry, the difference being that in bottomry the ship, or the ship and freight, is hypothecated instead of the cargo. The rules applicable to respondentia are determined in the main by the same principles as apply to bottomry, but in some respects they are special.

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[1] 1865, L.R. 1 Q.B. 115.

[2] *The "Karnak,"* 1869, L.R. 2 P.C. 505.

[3] Maclachlan, Merchant Shipping, 6th ed., p. 40.

SUBSECTION (2).—*Who may Grant Bond.*

894. Any person who has a vested assignable interest in the cargo may grant a bond of respondentia,[1] as in certain circumstances may the master of the ship. At one time it seems to have been not uncommon for merchants, desirous of raising funds to enable them to engage in foreign trade, to borrow money on the security of the cargo, laden and to be laden, on a ship on the outward and homeward voyages, repayment to be dependent on her safe return; but such contracts are now obsolete, possibly because the lender had really only the personal security of the borrower as a guarantee of repayment. It is improbable that any question will now arise in regard to a bond of respondentia granted by the owner of the cargo, but an owner might grant a valid bond in such circumstances as would justify the master in doing so.[2]

895. The master of the ship can only hypothecate the cargo in the event of an urgent necessity for funds arising in the course of the voyage, and there being no other means of procuring them; and before doing so he must, if possible, communicate with the cargo-owners,[3] unless there is no prospect of his receiving an answer within a reasonable time.[4] In communicating with the owners it is not sufficient to state merely the circumstances of the case, leaving them to draw their own inferences.[5] They must actually receive notice of the intention to raise money by respondentia.[6] Where, however, the owners of the cargo failed to reply to a communication fully informing them of the circumstances, and specially asking their advice as to what should be done in the circumstances, the bond was sustained.[7]

SUBSECTION (3).—*Essentials to Validity.*

896. It is essential to the validity of a bond of respondentia that it should have been granted for the benefit of the cargo. It may be granted for the benefit of the cargo alone, as in the case of *The "Sultan,"* [8] where a master, his ship having been wrecked, granted a bond to the salvors on condition of their allowing the cargo to be transhipped and forwarded to its destination; or it may be granted for the benefit of both ship and cargo, as in the case of *The "Gratitudine,"* [9] where it was held that a master might hypothecate the cargo in order to provide funds for the repair of the ship, provided such repairs produced some benefit, or prospect of benefit, to the cargo; and this case has been regularly followed.[10] Since the foundation of the master's authority to hypothecate the cargo for the benefit of the ship is the prospect of benefit to the cargo, it follows that, unless there is a reasonable prospect of benefit accruing to the proprietors of the cargo, the bond will be invalid. Where a master, in order to raise money for the repairs of the ship, granted a bond over the cargo payable at a port short of that to which the cargo was consigned, the validity of the bond was questioned by the Court, on the ground that the cargo would derive no benefit from reaching an intermediate port.[1] A master can only grant a bond over goods which have actually been shipped, as till then he has no control over them.[2] In granting a bond of respondentia the master only hypothecates the cargo, and does not transfer the property; it would therefore be incompetent for him to agree to deliver it to a person nominated by the lender at the port of destination.

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[1] Bell, Com. i. 478.

[2] *The "Duke of Bedford,"* 1829, 2 Hagg. 294, 304.

[3] *The "Gratitudine,"* 1801, 3 C. Rob. 240; *Jacobson* v. *Hansen*, 1850, 12 D. 762.

[4] *Cargo ex "Sultan,"* 1859, Swa. Adm. 504.

[5] *The "Oriental,"* 1851, 7 Moo. P.C.C. 398.

[6] *The "Panama,"* 1870, L.R. 3 P.C. 199; *The "Onward,"* 1873, L.R. 4 A. & E. 38.

[7] *The "Bonaparte,"* 1852, 8 Moo. P.C.C. 459.

[8] 1859, Swa. Adm. 504.

[9] 1801, 3 C. Rob. 240.

[10] *The "Lord Cochrane,"* 1844, 2 W. Rob. 320.

897. The onus of proving the validity of the bond lies on the lender.[3] Where cargo has been shipped in a foreign ship, the validity of any bond granted over it by the master will be determined by the law of the flag.[4] To entitle the lender to the maritime interest stipulated for in a bond of respondentia, it is essential that the cargo should have been exposed to sea risk; and where part only of the goods covered by a bond had been so exposed, it was held to be valid only as regards that part.[5]

SUBSECTION (4).—*Enforcement of Bond.*

898. The lender's right to repayment arises on the safe arrival of the goods, even though the ship should have been lost;[6] but if part only of the goods hypothecated arrive at their destination, he can only recover a proportional part of the money secured by the bond.[5] Where goods, over which a bond of respondentia had been granted, were subsequently necessarily transhipped, it was held that the master of the ship to which they were transferred had a lien for freight, and general average sustained in the course of the voyage, which was preferable to the right of the holder of the bond whose claim is also, in accordance with the general rule applicable to bottomry contracts, posterior to that of the holder of a subsequent valid bond.[7] Where a bond has been granted over ship, freight, and cargo, the ship and freight are primarily liable; and this is the case even when the cargo alone has been pledged, notwithstanding that an earlier bond over the ship alone may in consequence go unpaid.[8] Moreover, if cargo has been hypothecated for the benefit of the ship, the shipowners, although such hypothecation was also for the benefit of the cargo, are liable to indemnify the owners of the cargo in the event of it being attached and sold by the holders of the bond.[9]

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[1] *Anderston Foundry Co.* v. *Law*, 1869, 7 M. 836.

[2] *Jothanan Goodhue*, 1858, Swa. Adm. 355.

[3] *Jacobsen* v. *Hansen*, 1850, 12 D. 762, per Lord Justice-Clerk Hope at p. 771.

[4] *Lloyd* v. *Guibert*, 1865, L.R. 1 Q.B. 115; *The "Gaetano and Maria,"* 1882, 7 P.D. 137.

[5] *Cargo ex "Sultan,"* 1859, Swa. Adm. 504.

[6] Bell, Com. i. 584.

[7] *Cargo ex "Galam,"* 1864, 33 L.J. A. & E. 97.

[8] *The "Constancia,"* 1845, 2 W. Rob. 404; *The "Priscilla,"* 1860, 1 L.T. 272.

[9] *Benson* v. *Duncan*, 1848, 18 L.J. Ex. 169; *Anderston Foundry Co.* v. *Law, supra.*

899. It was formerly stated as a distinction between bottomry and respondentia, that the former gave the lender a real security over the ship, while in the latter he was entirely dependent on the personal security of the borrower, for the reason that the goods must necessarily be sold or exchanged in the course of the voyage.[1] This argument does not apply to the bonds of respondentia granted in modern times, and it is held that they create a maritime lien over the cargo, in favour of the lender, whenever the goods are expressly pledged;[2] but if a bond were granted by a cargo-owner in a home port, it would still confer no remedy on the lender against the goods.[3] In almost all other respects the rules applicable to bottomry and respondentia are the same.

Section 4.—Collision causing Damage.

900. A maritime lien for damage done by a ship attaches that instant upon the vessel doing it, and notwithstanding any change of possession travels with her into the hands of a *bona fide* purchaser though without notice, and being afterwards perfected by proceedings in Court relates back to the moment when it first attached. For a lien to attach the ship herself must be the instrument of damage and not merely the persons on board of her.[4] It attaches for damage to a landing-stage,[5] and to harbour works under the Harbour, Docks, and Piers Clauses Act, 1847.[6] It is not settled whether a lien attaches to a vessel which causes others to collide by her negligent navigation without herself making actual contact with either of them.

901. The proceedings, to be effectual, must, under the Maritime Conventions Act, 1911, be taken within two years from the date the injury was caused. Application for extension of this period can be granted by the Court.[7] The lien extends over the vessel, its tackle, gear, and appurtenances,[8] and the freight which was being earned at the time when the damage was done[9] and which has accrued due, and for the purpose of enforcing the lien for freight the cargo in respect of which it has been earned may be arrested. But there is no lien on the cargo itself which was on board the vessel at the time of the damage done.[10]

Section 5.—Collision causing Loss of Life or Personal Injury.

902. The Maritime Conventions Act, 1911,[11] allows an action *in rem* in England against a ship causing loss of life or personal injury in collision.

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[1] Blackstone's Com. ii. 457.

[2] Bell, Com. i. 583.

[3] Maclachlan on Merchant Shipping, 6th ed., p. 40.

[4] *Currie* v. *M'Knight*, 1896, 24 R. (H.L.) 1.

[5] *The* "*Veritas*," [1901] P. 304.

[6] *The* "*Merle*," 1874, 2 Asp. M.C. 402.

[7] For the circumstances in which this privilege is granted see M'Millan, Scottish Maritime Practice, pp. 101 *et seq.*; Maclachlan, Merchant Shipping, 6th ed., p. 239.

[8] *The* "*Dundee*," 1823, 1 Hagg. 109.

[9] *The* "*Orpheus*," 1871, L.R. 3 A. & E. 308.

[10] Maclachlan, Merchant Shipping, 6th ed., p. 240; *The* "*Victor*," 1862, Lush. 72; *The* "*Leo*," 1862, Lush. 444.

[11] 1 & 2 Geo. V. c. 57, s. 5.

Whether this can be held to create a maritime lien in England with the result of also creating one in Scotland is a question of great difficulty. In Scotland arrestment has always been competent in such cases.

SECTION 6.—SALVAGE.

903. The rendering of salvage services creates a maritime lien as well as giving rise to the common-law lien which the salvor has by continuing in possession of the salved vessel. The maritime lien is indefeasible by change of possession or even by transfer of property.[1] The lien is enforceable against ship, freight, and cargo severally but not jointly, and each is liable to contribute in proportion to its value, and cannot be made liable for the salvage due from the other.[2] Proceedings must be taken within two years from the date of salvage.[3]

SECTION 7.—SEAMEN'S WAGES.

904. Seamen have a lien recognised by the general maritime law of Europe whereby their ship is constituted their primary security. The lien extends over the whole of the ship, not merely as a ship, but to every plank of her as a mere wreck. It also extends over freight due from sub-charterers.[4] The lien remains indelible notwithstanding the sale of the vessel or wreck to a *bona fide* purchaser although without notice.[5]

SECTION 8.—MASTER'S WAGES.

905. The master had no lien by maritime law in respect of his wages,[6] but by statute [7] he has been given the same liens, rights, and remedies in respect of his wages as are possessed by seamen, *i.e.* over the ship and every plank of her and over freight.

SECTION 9.—MASTER'S DISBURSEMENTS.

906. The master had no lien for disbursements in maritime law, but by the Merchant Shipping Act, 1894, s. 167, he is given the same lien for disbursements which seamen have for wages. The disbursement must be such as the master had authority to make or incur on behalf of the shipowner,[8] and this would exclude disbursements made in a home port.[9] The disbursements must not be such as have been rendered necessary by the master's wrongful act.[10]

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[1] *Richardson* v. *Campbell*, 1821, 5 B. & Ald. 196, 203 n.; *Harmer* v. *Bell*, 1850, 7 Moo. P.C.C. 267.

[2] Maclachlan, Merchant Shipping, 6th ed., p. 517.

[3] Maritime Conventions Act, 1911, 1 & 2 Geo. V. c. 57, unless an extension of time is granted by the Court.

[4] *The* "*Andalina*," 1886, 12 P.D. 1.

[5] *The* "*Sidney Cove*," 1815, 2 Dod. 11.

[6] *Bristow* v. *Whitmore*, 1861, 9 H.L.C. 391.

[7] Merchant Shipping Act, 1894, s. 167.

[8] *The* "*Ripon City*," [1897] P. 226; cp. *The* "*Castlegate*," [1893] A.C. 38; *The* "*Orienta*," [1895] P. 49.

[9] *Clydesdale Bank* v. *Walker & Bain*, 1926 S.C. 72.

[10] *The* "*Limerick*," 1875, 1 P.D. 292, 411.

SECTION 10.—ASSIGNMENT OF MARITIME LIENS.

907. Abbott expresses an opinion that maritime liens are not generally assignable, but there seems to be no reason why the liens created by writ, *e.g.* bottomry and respondentia, should not be capable of being assigned by those in right of the bonds. The liens for damage by collision and for salvage services cannot be assigned. There is authority for the view that the lien for seamen's wages can be assigned, and it becomes vested in a person who pays the wages on the credit of the ship—not relying on the credit of the owners,[1] but in *The "Petone"*[2] Mr. Justice Hill, after reviewing the decisions (except *Clark* v. *Bowring* [3]), held that a person who had discharged a seaman's claim for wages without obtaining the leave of the Court did not thereby acquire this maritime lien. In the case of the *Clydesdale Bank* v. *Walker & Bain*,[4] the Second Division treated the question as still open, but did not require to decide anything in regard to it.

SECTION 11.—RANKING OF LIENS INTER SE.

908. Considered in relation to their object, liens may be divided into two classes—(1) liens in the nature of rewards for benefits conferred; (2) liens in the nature of reparation for wrong done. The first class comprises bottomry, respondentia, wages, master's disbursements, and salvage, and the general rule applicable to them is that the later the attachment in time the earlier in payment. Liens in the nature of reparation arise out of collision, and rank in the direct order of their attachment. Looking at these classes of liens relatively to each other, while according to general rule the liens of the one class yield precedence in claim to those of the other class when subsequent, the result of the order is greatly modified by positive law and equitable considerations. For the working out of the various competitions, reference should be made to the textbooks.[5]

SECTION 12.—RANKING OF MARITIME AND POSSESSORY LIENS.

909. In cases where maritime and possessory liens compete, the maritime liens attaching to the *res*, at the date when the possessory lien attached, must be satisfied before it, *e.g.* salvage and wages, but maritime liens attaching after the possessory lien are postponed to it.[6]

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[1] *The "St. Lawrence,"* 1880, 5 P.D. 250; *The "Tagus,"* [1903] P. 44; *Clark* v. *Bowring,* 1908 S.C. 1168; see also *The "William F. Safford,"* 1860, Lush. 69.

[2] [1917] P. 198; see also *The "Rene,"* 1922, 38 T.L.R. 790.

[3] 1908 S.C. 1168.

[4] 1926 S.C. 72.

[5] Maclachlan, 6th ed., pp. 569 *et seq.*; Abbott, 14th ed., p. 1026.

[6] *The "Gustaf,"* 1862, Lush. 506; *The "Immacolata Concezione,"* 1883, 9 P.D. 37.

MARK, SUBSCRIPTION BY.

See DEEDS, EXECUTION OF.

MARKET GARDENER.

See AGRICULTURAL HOLDINGS ACTS.

MARKETS.

See FAIRS AND MARKETS.

MARKING OF GOODS.

See MOVEABLES, DELIVERY OF; SALE.

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MARRIAGE.

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SECTION 1.—DEFINITION.

910. Marriage is both a civil contract and a religious ceremony or sacrament. As a civil contract, the only aspect considered in this article, it has been defined by Lord Penzance to be "the voluntary union for life of one man and one woman to the exclusion of all others."[1] It must be contracted under such conditions as to the capacity of parties, and with such forms and ceremonies as are required by the law of the country where it is entered into. It differs from ordinary contracts, for they, in Stair's words, "may be framed and composed at pleasure; but so cannot marriage, wherein it is not in the power of the parties, though of common consent, to alter any substantial."[2] "No conditions can be attached to it. No qualifications can be made on its effect."[3] It results in a *status* in which the personal rights and duties of the spouses, and, in the absence of special agreement, their patrimonial rights, are regulated by the law of the husband's domicile.

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[1] *Hyde* v. *Hyde*, 1866, L.R. 1 P. & D. at p. 133.

[2] Stair, i. 4, 1.

[3] *Lang* v. *Lang*, 1921 S.C. 44, per Lord Pres. Clyde.

SECTION 2.—SOURCES OF MARRIAGE LAW.

911. The Scots law of marriage is based upon the Canon law as administered in the Ecclesiastical Courts before the Reformation.[1] At the Reformation the Canon law was abrogated only so far as it conflicted with the Protestant religion,[2] and subject to this condition was administered by the Protestant Commissary Court in Edinburgh (founded in 1563), from which there was an appeal to the Court of Session.[3] The jurisdiction of the Commissary Court in questions of marriage was transferred to the Court of Session in 1830.[4] The Canon law has been altered and developed by statute and judicial decisions, and the Court will "reject or modify any rule or doctrine . . . which appears not to be in itself reasonable or expedient." [5]

SECTION 3.—CONSTITUTION OF MARRIAGE.

SUBSECTION (1).—*Exchange of Consent.*

912. It is essential that the parties interchange consent to take each other as husband and wife.[6] This may be done (1) by a regular marriage, or (2) by an irregular marriage, which is equally valid to all effects. Consent to marriage must be seriously intended. An interchange of consent made in jest and so understood is not a marriage. *Simulatæ nuptiæ nullius momenti sunt.*[7] Consent may be interchanged for some ulterior motive, and in the case of irregular marriage evidence is admissible that marriage was not intended.[8] The question is undecided whether the parties to a marriage celebrated *in facie ecclesiæ* can get their marriage annulled by leading evidence that they did not intend marriage. There is no decision directly in point, and the *dicta* are conflicting. In *Jolly* v. *M'Gregor* [9] Lord Chancellor Eldon expressly reserves his opinion, though Lord Mure in *Maloy* v. *Macadam* [10] quotes the judgment in *Jolly* as authority for the proposition that proof of intention can be applied even to a regular marriage. Professor More says, "The most formal acknowledgment of marriage, even though made *in facie ecclesiæ*, will be of no avail, if it shall appear that such was not the true intention of the parties." [11] Lord Stowell's judgment to the same effect in *Dalrymple* v. *Dalrymple*[1] is founded only on an opinion of the Hon. Henry Erskine, and, moreover, was unfavourably commented on by Lord Eldon in *Jolly*.[2] On the other hand, Lord Deas in *Robertson*[3] said "that in a regular marriage the parties cannot be heard to say that they did not mean and understand marriage," and this dictum was quoted with approval by Lord Justice-Clerk Scott-Dickson in a recent case.[4]

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[1] See *Collins* v. *Collins*, 1884, 11 R. (H.L.) 19; *Dalrymple* v. *Dalrymple*, 1811, 2 Hag. Con. at pp. 70, 81; Fraser, H. & W. i. 19–42.

[2] Act 1567, c. 31.

[3] Hailes, Dec. 499.

[4] 11 Geo. IV. & 1 Will. IV. c. 69, s. 31.

[5] *Collins* v. *Collins*, *supra*, per Lord Watson at p. 33.

[6] Bell's Prin., s. 1508; Ersk. Inst. i. 6, 2.

[7] Fraser, H. & W. i. 415; Bishop on Marriage and Divorce, i. s. 338; cf. *Gall* v. *Gall*, 1870, 9 M. 177; *Steuart* v. *Robertson*, 1875, 2 R. (H.L.) 80; *Davidson* v. *Davidson*, 1921 S.C. 341.

[8] *Sassen* v. *Campbell*, 1826, 2 W. & S. 309; *Taylor* v. *Kello*, 1787, 3 Pat. 56; *Lockyer* v. *Sinclair*, 1846, 8 D. 582.

[9] 1828, 3 W. & S. 85.

[10] 1885, 12 R. 431, at p. 455.

[11] Notes to Stair, 14; see *Browne* v. *Browne*, 1843, 5 D. 1288, per Lord Moncreiff at p. 1295.

SUBSECTION (2).—*Regular Marriage.*

(i) *Definition.*

913. A regular marriage is one celebrated by a minister before at least two witnesses,[5] and after due proclamation of banns, or publication of a notice by the registrar. A minister of any church can perform a regular marriage; and for this purpose a Jewish rabbi, or the person to whom the Quakers assign the duty of celebrating a marriage, is a minister.[6] No form, place, or hour is prescribed by law. There are no canonical hours for marriage, as in England.[7] It is assumed that the minister will solemnly ask the parties if they take each other for husband and wife, and, on their replying in the affirmative, that he will declare them to be married. And a marriage, if performed by a minister before two witnesses, after banns or notice to the registrar, is regular and *in facie ecclesiæ* though the ceremony takes place in a private house or in the public street.[8] The marriage is complete when the consent has been exchanged and before consummation has taken place. If the man were to die on leaving the church, he would leave a widow.[9]

(ii) *Banns.*

914. Until the passing of the Marriage Notice Act, 1878,[10] it was impossible to contract a regular marriage in Scotland without the previous publication of banns. The custom of publishing banns, which had obtained in some countries from the early days of the Church, was made general throughout Western Christendom by Innocent III. at the Lateran Council of 1215.[11] The statutes of this Council were copied in the Canons of the Provincial Councils held at Perth in 1242 and 1269.[12] Since that time at least banns have been regularly proclaimed in Scotland.[13] The essential elements of banns are: (1) the public proclamation before the congregation assembled in the church, that persons, whose names and designations are stated, intend to marry each other; and (2) the granting of an opportunity to any person who knows of a valid impediment to the marriage to state it before it is too late.

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[1] 1811, 2 Hag. Con. at p. 106—an English decision dealing with a Scottish marriage.

[2] 3 W. & S. at p. 148.

[3] 1874, 1 R. 532, at p. 667; rev. 1875, 2 R. (H.L.) 80.

[4] *Lang* v. *Lang*, 1921 S.C. 44, at p. 55.

[5] Bell's Prin., s. 1512; Fraser, H. & W. i. 289; 17 & 18 Vict. c. 80, s. 46.

[6] 4 & 5 Will. IV. c. 28; 17 & 18 Vict. c. 80, s. 46; *Ballantyne*, 1859, 3 Irv. 352.

[7] Fraser, H. & W. i. 282 and 289; Fergusson, Consistorial Law, iii.; Report of Royal Com. on Marriage Laws, 1868, p. 17.

[8] Bell's Prin., s. 1511.

[9] Hume on Crimes, i. 456; *Walker* v. *M'Adam*, 1813, 5 Pat. 675; *Leslie* v. *Leslie*, 1860, 22 D. 993.

[10] 41 & 42 Vict. c. 43.

[11] See Pollock and Maitland, Hist. of English Law, ii. 368; Pothier, Traité du Contrat de Mariage, partie ii. chap. ii. s. 1; Friedberg, Das Recht der Eheschliessung, 10, 124.

[12] Canons of the Church of Scotland, published by Hailes; see Fraser, H. & W. i. 283.

[13] See *Ballantyne*, *supra*, at p. 361.

915. The regulation of the practice as to banns has been, in general, left to the Church authorities, and has been dealt with in various Acts of Assembly.[1] Residence in the parish for fifteen clear days immediately preceding is required, but exceptions are allowed in the case of soldiers and sailors, or where one of the parties has been resident furth of Scotland. Where the parties reside in different parishes, proclamation must be made in the churches of both parishes. Application for proclamation of banns, giving the requisite particulars and accompanied by a certificate signed by two householders, is to be given to the session clerk. Proclamation is to be made on two separate Sabbaths in presence of the congregation. But where the parties are well known to the minister, or he is satisfied that there is no impediment, he may, in his discretion, complete the publication in a single Sabbath. This is now the general practice. In this case the certificate must not be granted till forty-eight hours after proclamation has taken place. It is the duty of a parish minister to celebrate a marriage on the production of a certificate that banns have been regularly proclaimed within three months immediately preceding. But he is not bound, though he is entitled, to receive as a valid notice of marriage a registrar's certificate under the Marriage Notice (Scotland) Act, 1878. The fee for proclamation of banns and certificate is not to exceed two shillings and sixpence.

916. The proclamation was formerly in use to be read by the precentor. But in this he is merely the mouthpiece of the minister, by whom, in the eye of the law, the proclamation is truly made.[2] Where the parish of residence is a parish *quoad sacra*, proclamation is to be made in the church of the parish *quoad sacra*, and not in that of the old parish out of which it was carved.[2] The proper course for any person who wishes to object to the marriage is to do so privately to the minister. No objection is valid except that there exists an impediment to the lawfulness of the marriage. A person interfering without such cause may render himself liable in damages.[3]

917. By the Act 1661, c. 34, persons domiciled in Scotland, but married in England or Ireland, must have their banns proclaimed in the parish church of their domicile. The English statute,[4] which regulates the practice there, is silent as to banns in Scotland, and doubts were felt as to a clergyman in England being entitled to proceed where the banns of one of the parties had been proclaimed in Scotland. These doubts were removed by the Marriages Validity Act, 1886,[5] under which a certificate of banns in Scotland is to be received in England.

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[1] See *Hutton* v. *Harper*, 1875, 2 R. 893, per Lord Pres. Inglis at p. 903.

[2] *Hutton* v. *Harper*, 1875, 2 R. 893, at p. 902; 1876, 3 R. (H.L.) 9, at p. 14.

[3] *Henderson* v. *Henderson*, 1855, 17 D. 348.

[4] 4 Geo. IV. c. 76, s. 2.

[5] 49 Vict. c. 3.

It may be mentioned that, by the English Marriage Acts, proclamation of banns on three several Sundays is still essential for valid proclamation in that country.[1]

918. All banns must, in Scotland, be proclaimed in the parish church, and, except in the case, immediately to be referred to, of Episcopalians, no proclamation in the church which they frequent is required by law. Proclamation in Roman Catholic churches of the banns of members of the congregation is insisted on as matter of ecclesiastical order, but is not required by law. The Toleration Act of 1711,[2] by which Episcopal ministers were allowed to solemnise marriage, provides (s. 7) that no Episcopal minister in Scotland shall "presume to marry any persons but those whose banns have been duly published three several Lord's days in the Episcopal congregations which the two parties frequent, and in the churches to which they belong as parishioners," and that upon the pains attached to the celebrators of clandestine marriages. This section is believed to be in desuetude, as is undoubtedly the provision of s. 2, which requires Episcopal clergymen to have their letters of orders recorded by the clerk of the justices of peace at Quarter Sessions. Both provisions were directed against the non-jurors. In practice, it is thought that in most Episcopalian churches banns are no longer proclaimed, except at the special request of the parties, and it is extremely unlikely that any prosecution for breach of the statute would now be instituted.

919. The proclamation of banns has been left in the hands of the Church. But various statutes impose penalties for want of compliance with the ordinances of the Church. The Act 1661, c. 34, imposes penalties for clandestinely celebrating marriages. And by the Marriage Notice (Scotland) Act, 1878,[3] "any person otherwise entitled to celebrate a marriage"—that is, since 4 & 5 Will. IV. c. 28, practically any minister of religion—"who does so without certificates of due proclamation of banns or of registrars' certificates of notice under that Act, or one certificate of each kind, as the case may be, is liable to a penalty of £50." [4]

(iii) *Marriage Notice* (*Scotland*) *Act*, 1878.[5]

920. This Act introduced an alternative procedure. A regular marriage can now be constituted after obtaining a registrar's certificate that notice of the intended marriage has been made in the statutory manner. This certificate, "for all purposes of law," save as provided in the Act, comes in place of a certificate that banns have been duly proclaimed. But a minister of the Church of Scotland is not bound, though he is entitled, to celebrate a marriage not preceded by banns (s. 11). Where both the parties reside in Scotland, one may proceed by banns and the other by notice to the registrar (s. 12).

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[1] 4 Geo. IV. c. 76, s. 2; see Hammick, Marriage Law of England, p. 68.

[2] 10 Anne, c. 10.

[3] 41 & 42 Vict. c. 43, s. 12.

[4] See *Ballantyne*, 1859, 3 Irv. 352; per Lord Chancellor Cairns in *Hutton* v. *Harper*, 1876, 3 R. (H.L.) 9, at p. 11; *Strathern* v. *Stuart*, 1926, J.C. 114.

[5] 41 & 42 Vict. c. 43.

921. The statute is limited to "persons residing in Scotland" (s. 7), *i.e.* at least for fifteen clear days prior to the notice. Accordingly, where one of the parties is furth of Scotland, and will not reside there during the three weeks preceding the marriage, the Act does not apply. The Registrar-General for Scotland, in an official circular of 30th December 1878, states that, in the opinion of Crown Counsel, a registrar is not entitled to grant his certificate of publication in cases where one of the contracting parties resides in England or Ireland or elsewhere furth of Scotland. In such cases, therefore, a certificate of proclamation of banns in the case of the party residing in Scotland is still indispensable. The same Registrar-General has elsewhere stated that "there is no express rule having statutory or other legal authority as to how the case of the party resident in England or elsewhere out of Scotland ought to be treated." According to the same authority, the usual practice is for the officiating minister to ask such party (if a resident in England) to produce a certificate of publication of banns in the parish of his or her residence, or, if for any good reason this cannot be produced, to accept such evidence as he may consider sufficient that the party is in a position lawfully to contract marriage. In this case, accordingly, the minister, where he is satisfied that there is no impediment, may be content with a certificate of the proclamation of the banns of that one of the parties who is resident in Scotland, or he may allow proclamation of the banns of the other party after less than fifteen days' residence in the parish.

922. The notice to the registrar must state the name, condition (*i.e.* if widower, etc.), rank, age, and residence of the parties, and contain a declaration, subject to the penalties of perjury, that the party giving the notice knows of no impediment to the marriage, and has resided within the registrar's parish or district for fifteen days preceding. Two householders in the parish or district must sign the notice, and declare that they believe the statements therein made to be true (Schedule A). The notice is to be posted up by the registrar for seven days, during which time any person may appear personally and lodge an objection, which must be in writing, and subscribed by him. Where the objection does not set forth any legal impediment to the marriage, but relates to some formality or statutory requirement, *e.g.* that the parties have not resided for fifteen days, or are wrongly named or described, the registrar must suspend the issue of his certificate, and report to the Sheriff or Sheriff-Substitute of the county in which his office is situated. The Sheriff may allow the notice to be amended without republication, or may order it to be cancelled if he shall see fit. In the latter case the parties may give notice *de novo* (s. 10 (*a*)). Where the objection avers a legal impediment, the registrar must suspend the issuing of his certificate until there shall be produced to him a certified copy of a judgment of a competent court of law to the effect that the parties are not, in respect of the objection, disqualified from contracting the marriage (s. 10 (*b*)). The wilful statement of a false objection is to be deemed perjury (s. 14).

Where no objection has been made, the registrar, on the expiration of seven clear days, grants a certificate. The fees amount to two shillings and sixpence. The certificate becomes void if the marriage does not take place within three months (s. 11).

(iv) *Naval Marriages Act,* 1908.

923. This Act [1] authorises, for the purposes of marriages in the United Kingdom, the publication of banns and the issue of certificates on board His Majesty's ships. Where one of the parties to a marriage intended to be solemnised in Scotland after the publication of banns is an officer, seaman, or marine, borne on the books of one of His Majesty's ships at sea, the banns may be published on three successive Sundays at morning service on board that ship, by the chaplain, or, if there is no chaplain, by the captain or other officer commanding the ship; and where banns have been so published, the person who published them shall, unless the banns have been forbidden on any of the grounds on which banns may be forbidden, give a certificate of publication (s. 1). So, too, where one of the parties to a marriage intended to be solemnised or contracted in Scotland otherwise than after the publication of banns, or by licence, or by special licence, is an officer, seaman, or marine, borne on the books of one of His Majesty's ships at sea, he may give notice of his intention to the captain or other officer commanding the ship, together with the name and address of the other party to the marriage, and such other information as may be necessary to enable the captain or other officer to fill up a certificate, and shall at the same time make and sign such a declaration as is required by the Marriage Notice (Scotland) Act, 1878, and the captain or other officer may attest the declaration, and thereupon issue a certificate to the applicant (ss. 2, 4). A certificate under the Act is to be in such form as may be prescribed by the Admiralty, and shall have the like force and effect as a certificate of publication of banns in a place of worship in which banns may be lawfully published, or a certificate by a registrar under the Marriage Notice (Scotland) Act, 1878, as the case may be, and all enactments (including penal provisions) relating to the publication of banns and certificates thereof, and to notices and declarations for obtaining certificates and to such certificates, and all rules required under any such enactments to be observed, shall apply in the case of marriages to which the Act applies (ss. 3, 4).

SUBSECTION (3).—*Clandestine Marriage.*

924. Clandestine marriage, properly used as a term of Scots law, denotes a marriage constituted with a religious ceremony, but not satisfying the requirements of the law either (1) because it has been celebrated by a minister without due proclamation of banns or notice by the registrar,[1] or (2) because it has been celebrated by a layman assuming the character of a minister.[2] The term clandestine marriage is sometimes improperly used as synonymous with irregular marriage.[3] The celebration of a clandestine marriage without banns is not an offence at common law,[4] but the Marriage Notice (Scotland) Act, 1878,[5] provides that "any person otherwise entitled to celebrate a marriage, who does so without certificates of due proclamation of banns or of registrar's certificates of notice . . . or one certificate of each kind, as the case may be, is liable to a penalty of £50."

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[1] 8 Edw. VII. c. 26.

925. To personate a minister and perform clerical functions is a crime at common law.[6] A layman who celebrates a marriage but does not personate a clergyman commits an offence under statute but not at common law. Merely witnessing the interchange of consent will not amount to "celebration"; there must be "an assumption to some extent of the proper function of a minister of religion." [7] The Act 1661, c. 34, made the parties to a clandestine marriage liable to imprisonment for three months and to certain fines according to their rank, and it made the celebrator of such marriages punishable by banishment. The Act 1698, c. 6, which was repealed in part by the Statute Law Revision (Scotland) Act, 1906,[8] re-enacts these penalties, and further renders the celebrator liable to "such pecunial or corporal pains as the Lords of Privy Council shall think fit to inflict." The Act also renders the witnesses liable to a fine of £100 Scots, "or if insolvent to such corporall punishment as the said Lords shall think fit to determine." If the contracting parties refuse to disclose the names and designations of the celebrator and witnesses, they are made liable to fines according to their rank, and to imprisonment until they disclose them.

926. The Act of 1661 was primarily directed against "Jesuits, Priests, Deposed or Suspended Ministers," and the Act of 1698 against nonconforming ministers, and to that extent they were repealed by 4 & 5 Will. IV. c. 28, which legalised marriages performed by ministers not of the Established Church. Baron Hume observes [9] that the celebrator alone has ever been prosecuted for the offence of celebrating clandestine marriage, and that it is doubtful whether the Court of Justiciary has succeeded to the discretionary powers of the Privy Council to inflict punishment upon him under the Act of 1698; in any event, he says, "there is no sentence on record which inflicts any penalty in addition to those appointed by the Act 1661."

927. As between the contracting parties, a clandestine marriage will, in the absence of other impediment, be valid as an irregular marriage.[10]

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[1] Hume on Crimes, i. 463–7.

[2] Fraser, H. & W. i. 229–258.

[3] Fraser, H. & W. i. 229.

[4] *Ballantyne*, 1859, 3 Irv. 352; *Strathern* v. *Stuart*, 1926, J.C. 114.

[5] 41 & 42 Vict. c. 43, s. 12.

[6] Hume, i. 465, 467, and case of *Craighead, ibi cit.*

[7] *Ballantyne, supra*, per Lord Justice-Clerk Inglis at p. 373; Hume, i. 465; Alison, i. 545; *Strathern* v. *Stuart, supra.*

[8] 6 Edw. VII. c. 38.

[9] Crimes, i. 464.

[10] Stair, i. 4, 6.

SUBSECTION (4).—*Irregular Marriage.*

928. Irregular marriage is constituted by the parties consenting without ceremony to take each other for husband and wife either (i) by declaration *de præsenti*, or (ii) by promise *subsequente copula*, or (iii) by cohabitation and habite and repute, the last mode being more properly an inference from the subsequent conduct of the parties that there has been a marriage under one of the two foregoing forms.[1]

(i) *Marriage* per verba de præsenti.

929. By Lord Brougham's Act, 1856,[2] it was provided[3] that "no irregular marriage contracted in Scotland by declaration, acknowledgement, or ceremony (after 31st December 1856) shall be valid unless one of the parties had, at the date thereof, his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage." The twenty-one days run from midnight to midnight, and the twenty-first day must have begun. In the case of *Lawford* v. *Davies*,[4] where both parties arrived in Scotland at 4 a.m. on 1st July, and were married between 11 and 12 a.m. on the 21st, the marriage was held to be invalid. Lord Brougham's Act was passed to check the Border runaway marriages, which were usually entered into by declaration before some self-constituted official, such as the well-known Gretna Green blacksmith. The words of the Act apply to marriages by "declaration, acknowledgement, or ceremony," and do not appear to cover the other forms of irregular marriage. The consent of the spouses must be given with genuine matrimonial intent, not in jest or with ulterior motives. When consent has been interchanged it constitutes *ipsum matrimonium* before the union is consummated.[5] The constitution of the marriage will not be suspended by any agreement between the parties to keep it secret.[6] The consent of parties requires no precise form of words, and may be given by verbal declaration or in writing, but the writing is only evidence of the contract. As Lord Moncreiff said in the case of *Lockyer* v. *Sinclair*:[7] "Admitting the effect of written acknowledgments of marriage as evidence of marriage, it is not in the writings that the contract consists, but in the present deliberate consent supposed to be proved by them."

930. Proof may be by parole[8] or by writing. The writing need not be holograph or tested, but if an improbative writ is propounded, the party producing it must shew that the other party's signature was genuine and was intended as an adoption of the contents of the document.[1] The consent may be tacit. In the case of *Hamilton*[2] it was held to be sufficient that a letter from the man, purporting to be an acknowledgment of marriage, had been seen and assented to by the woman.[3] Where there is no precise and definite acknowledgment in writing, the Court may infer from the tenor of a correspondence that consent must have been interchanged. In such a case the pursuer is not required to aver with particularity the precise time and place at which the marriage was constituted.[4] Consent may even be inferred from facts and circumstances without evidence in writing.[5] Marriage was held to be proved in a case[6] where the parties had exchanged written acknowledgments of marriage which were afterwards destroyed, the defender admitting their tenor, but maintaining that they were given for a collateral purpose.

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[1] Lord Westbury in *Sassen* v. *Campbell*, 1867, L.R. 1 Sc. App. at p. 211.

[2] 19 & 20 Vict. c. 96.

[3] Sec. 1.

[4] 1878, 4 P.D. 61.

[5] *Walker* v. *M'Adam*, 1813, 5 Pat. 675, per Lord Chancellor Eldon at p. 691; *Aitchison* v. *Incorporation of Solicitors*, 1838, 1 D. 42; *Leslie* v. *Leslie*, 1860, 22 D. 993, per Lord Deas at p. 1011; *Ballantyne*, 1859, 3 Irv. 352, per Lord Justice-Clerk Inglis at p. 360, and Lord Deas at p. 374; Fraser, H. & W. i. 294.

[6] *Leslie*, *supra*; *Dalrymple* v. *Dalrymple*, 1811, 2 Hag. Con. Rep. 54; *Hamilton* v. *Hamilton*, 1842, 1 Bell's App. 736; *Brebner* v. *Bell*, 1904, 12 S.L.T. 2; *Mackenzie* v. *Mackenzie's Trs.* (O.H.), 1916, 1 S.L.T. 349.

[7] 1846, 8 D. 582, at p. 616.

[8] *Walker* v. *M'Adam*, *supra*.

931. It is not enough to table an acknowledgment of marriage; the Court must be satisfied, on a view of the whole circumstances and the conduct of parties, that there was a genuine consent to present marriage.[7] The onus of proof lies on the party propounding the document.[8] A party to a mutual declaration of marriage will not be allowed to plead a mental reservation if he induced the other party to believe that he was giving consent.[9] It is not necessary to aver and prove *copula*, for *consensus non concubitus facit matrimonium*,[4] but *copula* may be an important fact in proving consent, and if one of the parties induced the other to permit *copula* by giving present consent to marriage, he will be barred from proving that his consent was feigned. The registration of a child as legitimate or the reverse is evidence against the party registering,[10] but is not positive evidence for or against marriage.[11]

932. The Act[12] provides that in matrimonial causes the grounds of action shall be "substantiated by sufficient evidence." Reference to the defender's oath is not by itself a sufficient proof of marriage *per verba de præsenti*, especially where the interests of third parties would be prejudiced.[1] The same principle has been applied to prevent a separation being granted on the bare admissions of the defender upon record, actions of separation having been assimilated to other consistorial causes by the Court of Session Act.[2] The pursuer's averments cannot be proved by his or her unsupported evidence; the parties are now admissible witnesses under the Evidence Act, 1853,[3] as amended by the Evidence Act, 1874,[4] but the pursuer's evidence will be tested very strictly.[5] In the case of *Petrie* v. *Petrie* [6] it was held, by a majority of three judges to two, that facts and circumstances which were insufficient in themselves to prove marriage might be sufficient corroboration of the pursuer's testimony that interchange of consent had taken place *per verba de præsenti.* In the *Dysart Peerage* case Lord Watson [7] and Lord Blackburn [8] both deliver *dicta* to the effect that it is not competent to take afterwards the evidence of a person who was not an admissible witness at the date of the alleged marriage, but the soundness of these *dicta* has been doubted.[9] The oaths or admissions of both parties combined will not of themselves prove marriage, but, as Stair says,[10] may raise a suspicion of collusion.

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[1] *Mackenzie* v. *Stewart*, 1848, 10 D. 611, per Lord Fullerton at p. 642; Fraser, H. & W. i. 300.

[2] *Hamilton* v. *Hamiton*, 1842, 1 Bell's App. 736.

[3] Ersk. i. 6, 5; *Forster* v. *Forster*, 1872, 10 M. (H.L.) 68.

[4] *Leslie* v. *Leslie*, 1860, 22 D. 993.

[5] *Aitchison* v. *Incorporation of Solicitors*, 1838, 1 D. 42.

[6] *Imrie* v. *Imrie*, 1891, 19 R. 185.

[7] *Fleming* v. *Corbet*, 1859, 21 D. 1034, per Lord Justice-Clerk Inglis at p. 1044; *Maloy* v. *Macadam*, 1885, 12 R. 431; *Duran* v. *Duran*, 1904, 7 F. 87; *Elliot* v. *Parkinson* (O.H.), 1905, 12 S.L.T. 710; *Davidson* v. *Davidson*, 1921 S.C. 341; *Dysart Peerage* case, 1881, 6 App. Cas. 489, at p. 537.

[8] *Imrie* v. *Imrie, supra*; Fraser, H. & W. i. 298.

[9] *Duran, supra*; cf. *Brebner* v. *Bell* (O.H.), 1904, 12 S.L.T. 2.

[10] *Robertson* v. *Steuart*, 1875, 2 R. (H.L.) 80.

[11] *Beattie* v. *Nish*, 1878, 5 R. 775; *Mackenzie* v. *Mackenzie's Trs.* (O.H.), 1916, 1 S.L.T. 349.

[12] 11 Geo. IV. & 1 Will. IV. c. 69, ss. 33 and 36.

(ii) *Marriage by Promise* subsequente copula.

933. If a woman, on the faith of a promise of marriage given in Scotland, allows *copula* to take place, also in Scotland, marriage is constituted.[11] In view of the principles laid down in *Mackie's* case there is no reason why an action of declarator on this ground should not be brought by the man as well as by the woman,[12] and it has been entertained where brought by a child of the parties after the death of one of them.[13] The theory of this form of constituting marriage is that the *de futuro* promise is converted into *de præsenti* matrimonial consent at the time of the *copula.*[14] The promise and *copula* must both take place in Scotland,[15] or at least in a country by whose law promise *cum copula subsequente* constitutes marriage. There must be a definite promise of marriage; courtship is not enough.[16] The *copula* must have been allowed on the faith of the promise, or, as it has been otherwise put, there must be matrimonial intent, at least on the woman's part.[17]

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[1] *Longworth* v. *Yelverton*, 1867, 5 M. (H.L.) 144.

[2] 13 & 14 Vict. c. 36, s. 16; *Muirhead* v. *Muirhead*, 1846, 8 D. 786.

[3] 16 Vict. c. 20.

[4] 37 & 38 Vict. c. 64, s. 1.

[5] *Dysart Peerage* case, 1881, 6 App. Cas. 489, per Lord Blackburn at p. 515, and Lord Watson at p. 538.

[6] 1911 S.C. 360.

[7] At p. 505.

[8] At p. 515.

[9] Per Lord Pres. Dunedin in *Deans's Judicial Factor* v. *Deans*, 1912 S.C. 441, at p. 448.

[10] iv. 45, 19.

[11] *Mackie* v. *Mackie*, 1917 S.C. 276.

[12] See *Lindsay* v. *Lindsay*, 1927 S.C. 395.

[13] *X.* v. *Y.* (O.H.), 1921, 1 S.L.T. 79.

[14] Lord Chelmsford in *Longworth* v. *Yelverton*, 1864, 4 Macq. at p. 879; Lord Cottenham in *Stewart* v. *Menzies*, 1841, 2 Rob. App. at p. 591; Stair, i. 4, 6.

[15] *Longworth, supra*, and per Lord Kingsdown at p. 902; Fraser, H. & W. i. 384.

[16] *Monteith* v. *Monteith*, 1844, 6 D. 934.

[17] *Morrison* v. *Dobson*, 1869, 8 M. 347; *Maloy* v. *Macadam*, 1884, 12 R. 431; *The Queen* v. *Millis*, 1844, 10 Cl. & Fin. at p. 782.

The good faith of the promise is immaterial if the woman can shew that she relied upon it.[1]

934. The *copula* will be presumed to have been allowed on the faith of the promise,[2] and if the promise was conditional, the condition will be presumed to have been waived at the time of the *copula*.[3] These presumptions may be rebutted. If there has been intercourse before the promise, it lies on the party alleging marriage to prove that subsequent intercourse was only allowed on the faith of the promise, and in such cases the character of the woman will be taken into consideration.[4] A promise to marry a woman if she becomes pregnant necessarily remains conditional at the time of the *copula*, and therefore cannot found a claim to marriage.[5] If the promise is withdrawn before the *copula* takes place, Lord Brougham [6] thinks that the *copula* revives the promise and repeals the renunciation. There must be no *medium impedimentum* between the *copula* and the previous promise.[7] The Court has held that an interval of six or eight months did not necessarily shew a disconnection between the two,[8] but the question whether intercourse taking place in a foreign country between the date of the promise and the *copula* in Scotland would be an impediment was reserved in *Longworth*,[9] Lord Westbury, who dissented, being of opinion that it would not.[10] If the *copula* was on the faith of the promise to marry, marriage is constituted, even if the parties were ignorant that this would be the result.[11]

935. The promise must be proved by the writ of the defender. Specific words of promise are not necessary provided that the writings can bear the inference of a promise.[12] The writings must be proved to be genuine and to have been delivered.[13] The writ will be considered in the light of the whole circumstances and the actings of the parties.[14] It was the old law that the promise could be proved by reference to the defender's oath,[15] but in the *Longworth* case [16] it was observed by Lord Chelmsford that this had been rendered incompetent by the Act,[17] which required the grounds of action in declarators of marriage to be "substantiated by sufficient evidence"; and Lord Cranworth goes so far as to say, "I must confess that independently of that statute I cannot believe that it can be the law of Scotland that in such a case as this there should be a reference to oath." Their Lordships adopted the reasoning of Lord Moncreiff in a bankruptcy case [1] that reference to oath is only admissible where the parties have opposed interests, and no interest of third parties is involved. The Evidence Act of 1874,[2] which made the parties admissible witnesses (s. 1), expressly declares (s. 3) that the law relating to the proof of a promise of marriage in a declarator of marriage by promise *subsequente copula* is not thereby affected. The *copula* may be proved *prout de jure*.[3]

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[1] Per Lord M'Laren in *Maloy* v. *Macadam*, 1884, 12 R. 431, at p. 488.

[2] *Morrison* v. *Dobson*, 1869, 8 M. 347.

[3] Stair, iv. 45, 19.

[4] *Sim* v. *Miles*, 1829, 8 S. 89; *Ross* v. *Macleod*, 1861, 23 D. 972, at p. 994; *Surtees* v. *Wotherspoon*, 1873, 11 M. 384.

[5] *Stewart* v. *Menzies*, 1841, 2 Rob. App. 547, at p. 591; *Kennedy* v. *Macdonald*, 1794, Fergusson, Consist. Law, p. 163; Fraser, H. & W. i. 381.

[6] *Craigie* v. *Hoggan*, 1839, M'L. & Rob. at p. 975.

[7] Lord Brougham in *Campbell* v. *Honyman*, 1831, 5 W. & S. 92, at p. 144.

[8] *Sim* v. *Miles*, 1829, 8 S. 89; *Craigie, supra.*

[9] *Longworth* v. *Yelverton*, 1864, 4 Macq. 743.

[10] *Ibid.*, at p. 859.

[11] *Sim, supra*; *Reid* v. *Laing*, 1823, 1 Sh. App. 440, per Lord Eldon at p. 451; *Campbell* v. *Honyman, supra*, per Lord Brougham at p. 150; *Longworth* v. *Yelverton, supra*, per Lord Westbury at p. 854.

[12] *Murray* v. *Napier*, 1861, 23 D. 1243; *Lindsay* v. *Lindsay*, 1927 S.C. 395.

[13] *Mackenzie* v. *Stewart*, 1848, 10 D. 611, at p. 638.

[14] *Maloy* v. *Macadam, supra.*

[15] *Harvie* v. *Crawford*, 1732, Mor. 12388; *Ross* v. *M'Leod*, 1861, 23 D. at p. 988; Bell's Prin., s. 1518.

[16] 5 M. (H.L.) 144.

[17] 11 Geo. IV. & 1 Will. IV. c. 69.

(iii) *Marriage by Cohabitation and Habite and Repute.*

936. "Cohabitation, and behaving as man and wife for a considerable time, presumeth marriage, though there be neither contract, promise, nor *sponsalia* preceding, nor evidence of copulation by children." [4] Erskine says: [5] "This legal presumption is grounded not only on the nature of things, but on Statute 1503, c. 77, which provides that a woman, who has been reputed the wife of a man till his death, shall be entitled to and enjoy the terce as his widow, till it be proved that she was not his lawful wife." In more modern times this form of marriage has been defined by Lord Westbury: [6] "It is the holding forth to the world by the manner of daily life, by conduct, demeanour, and habit, that the man and the woman who live together have agreed to take each other in marriage, and to stand in the mutual relation of husband and wife; and when credit is given by those among whom they live, by their relations, neighbours, friends, and acquaintances, to these representations and this continued conduct, then habite and repute arise and attend upon the cohabitation." [7] Lord Westbury continues: "It would be more proper to say that cohabitation with habite and repute is a mode of proving the fact of marriage rather than a mode of contracting marriage." Lord Glenlee [8] expresses the matter thus: "A man's allowing a woman to take the station and be called his wife is a constant and continued declaration of consent."

937. The cohabitation must be at bed and board,[9] and it must have been in Scotland.[10] There is no minimum period fixed by law, but the Court has always required several years.[11] Ten months was held to be insufficient.[12] Lord Moncreiff lays it down in *Lapsley* that the cohabitation must be proved to have begun with the deliberate intention by both parties to constitute marriage *de præsenti*,[9] and therefore that the parties must have been so situated that they could give an unconditional consent to be married.

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[1] *Adam* v. *Maclachlan*, 1847, 9 D. 560.
[2] 37 & 38 Vict. c. 64.
[3] *Harvie* v. *Crawford*, 1732, Mor. 12388.
[4] Stair, iv. 45, 19.
[5] i. 6, 6.
[6] *Sassen* v. *Campbell*, 1867, L.R. 1 Sc. App. at p. 211.
[7] See Lord Watson in *Dysart Peerage* case, 1881, 6 App. Cas. at p. 549.
[8] *Elder* v. *M'Lean*, 1829, 8 S. 56.
[9] *Lowrie* v. *Mercer*, 1840, 9 D. 953.
[10] *MacCulloch* v. *MacCulloch*, 1759, 2 Pat. 33; *Dysart Peerage* case, 1881, 6 App. Cas. 489.
[11] Fraser, H. & W. i. 400; *Lapsley* v. *Grierson*, 1845, 8 D. 34, at p. 61.
[12] *Wallace* v. *Fife Coal Co.*, 1909 S.C. 682.

938. The presumption of marriage arising from cohabitation with habite and repute is stronger than an ordinary presumption of fact, and must receive effect unless there is strong and cogent evidence to the contrary.[1] Where there was an impediment to marriage when intercourse began, at least where the impediment was known to the parties, the presumption is rebutted, and it is presumed that the intercourse continues to be illicit.[2] The habite and repute must exist among the friends and equals of the parties, who would have good opportunities of judging, and before whom a man would not be likely to pass off a mistress as his wife.[3] Lord Watson says in the *Dysart Peerage* case: [4] "Where a man takes his mistress with him to an hotel, or goes with her to a shop to buy baby linen, the probability is that he will prefer describing her as his wife to explaining her true position." Consequently evidence coming from such sources will be of little value. In weighing the evidence the Court will attach more importance to opinions of witnesses unfavourable to marriage than to those who are favourable to it—in fact, if there is divided opinion, the declarator will fail.[5] "Evidence of repute is worth very little unless it is founded on relationship or a degree of intimacy which is sufficient to give some real knowledge of the relations of the parties." [6] Proof of both cohabitation and habite and repute may be led *prout de jure.*[7]

SUBSECTION (5).—*Declarator of Marriage.*

939. As between the parties marriage must be established by an action of declarator, or refuted by an action of putting to silence, and during their lifetime they alone are the proper pursuer and defender. When pronounced in an action between them, the decree of declarator is a judgment *in rem*, binding on all persons whomsoever.[8] The question of marriage may be tried and decided incidentally in actions raised by third parties having a substantial interest—for instance, in actions by children to settle their legitimacy, and to substantiate claims founded on their legitimacy, or in actions by parish councils to decide a pauper's settlement; [9] the Court has also, by indulgence, allowed incidental proof in cases of small value,[10] but the decisions in all such cases are not *res judicata* between the spouses. If the question of marriage arises in an action between one of the spouses and a third party, the Court will in general sist the action, in order that the question may be decided by declarator of marriage.[1] In the case undernoted[2] the Court by a majority sustained a defence of nullity of marriage by way of exception on the pursuer's own admissions.

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[1] *De Thoren* v. *Attorney-General*, 1876, 3 R. (H.L.) 28, per Lord Chancellor Cairns.

[2] *Dysart Peerage* case, 1881, 6 App. Cas., per Lord Watson at p. 539; *Cunningham* v. *Cunningham*, 1814, 2 Dow 482; *Lapsley* v. *Grierson*, 1848, 1 Cl. & Fin. 498.

[3] *Thomas* v. *Gordon*, 1829, 7 S. 872; see *Lynch* v. *Lynch*, 1926 S.N. 172; *Cossar* v. *Cossar* (O.H), 1901, 9 S.L.T. 44.

[4] 6 App. Cas. at p. 552.

[5] *Cunningham* v. *Cunningham*, *supra*; *Hamilton* v. *Hamilton*, 1839, 2 D. 89; *Lapsley* v. *Grierson*, *supra*, at p. 61.

[6] *Lynch* v. *Lynch*, *supra*, per Lord Constable.

[7] *Dysart Peerage* case, *supra*, at p. 513.

[8] *Longworth* v. *Yelverton*, 1867, 5 M. (H.L.) 144.

[9] *M'Donald* v. *Mackenzie*, 1891, 18 R. 502.

[10] *Wright* v. *Sharp*, 1880, 7 R. 460.

940. It has not been decided whether the executor of a deceased pursuer can continue an action of declarator of marriage, but Lord Young[3] was of opinion that it is competent. The action can be competently brought against the heirs of a deceased spouse, where the pursuer avers either regular marriage, or irregular marriage *per verba de præsenti*[4] or by promise *subsequente copula*,[5] or by cohabitation and habite and repute. The summons may conclude alternatively for one or other of the different modes of marriage, but in such cases the grounds of action should be kept distinct,[6] for, as Lord Manor observes,[7] the same writing cannot be evidence both of a present consent to marry and of a promise to marry at a future time. The summons may conclude for nullity of a second marriage of the defender.[8] If there are conclusions for nullity, the spouse of the second marriage must be called as defender; but it is not necessary to conclude for nullity, which necessarily follows from a declarator of the first marriage; and if there are no conclusions for nullity it has been held[9] that the second spouse has no title to insist on being made a party to the action. Probably in modern practice the Court would order the second spouse to be called as a defender.[10]

SECTION 4.—REGISTRATION OF MARRIAGES.

SUBSECTION (1).—*Regular Marriages.*

941. By the Registration of Births, etc. (Scotland) Act, 1854,[11] it is provided that the parties intending to contract a regular marriage shall procure a copy of Schedule C appended to the former Act from the registrar of the parish (or district) within which they intend to solemnise the marriage. It is filled in by the registrar, and produced to the minister at the marriage. After the ceremony it must be signed by the minister, by the parties, and by two witnesses, and is then handed back to the parties, by whom it must be transmitted, within three days after the marriage, to the registrar of the parish (or district) within which the marriage was solemnised. On failure to do so the husband, and, failing him, the wife, is liable to a penalty of £10.

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[1] *Rudland* v. *Gilbert*, 1843, 16 Sc. Jur. 97; *Lenaghan* v. *Monkland Steel and Iron Co.*, 1857, 19 D. 975; see *Wallace* v. *Fife Coal Co.*, 1909 S.C. 682.

[2] *Sharp* v. *Sharp*, 1898, 25 R. 1132.

[3] *Green* v. *Green or Borthwick*, 1896, 24 R. 211.

[4] *Leslie* v. *Leslie*, 1860, 22 D. 993.

[5] *Mackie* v. *Mackie*, 1917 S.C. 276; cf. *X.* v. *Y.* (O.H), 1921, 1 S.L.T. 79.

[6] *Lowrie* v. *Mercer*, 1840, 2 D. 953.

[7] *Forster* v. *Forster*, 1869, 7 M. 797.

[8] Lothian, Consist. Law, p. 87.

[9] *Jolly* v. *M'Gregor*, 1828, 3 W. & S. 85.

[10] C.A.S., B, i. 5; Fraser, H. & W. ii. 1240.

[11] 17 & 18 Vict. c. 80, s. 46, as amended by 23 & 24 Vict. c. 85, s. 15.

SUBSECTION (2).—*Irregular Marriages.*

942. The old practice was for the parties to an irregular marriage, who wished their marriage to be registered, to get themselves convicted before the magistrate or justice of the peace, on a complaint by the Procurator-Fiscal, of having celebrated a clandestine and irregular marriage contrary to the Act 1661, c. 34, and other statutes.[1] The extract conviction was then sent to the registrar. This procedure is no longer lawful.[2] The parties to an irregular marriage may within three weeks thereafter present a joint application for a warrant to register such marriage to the Sheriff or Sheriff-Substitute of the county where it was contracted; they must produce with the application a schedule of particulars in the form prescribed by statute,[3] filled up by the registrar and signed by them; and on being satisfied of the fact of marriage and of the residential qualification, the Sheriff must grant warrant to the registrar to register the marriage. The Sheriff-Clerk within three days from the granting of the warrant transmits the application, warrant, and schedule of particulars to the registrar.

SUBSECTION (3).—*Marriages established by Declarator.*

943. When any marriage, regular or irregular, has been established by declarator either of the parties may, on production to the registrar of the extract decree, register the marriage in the parish of their domicile or usual residence; and the Clerk of Court must inform the registrar of the decree having been pronounced.[4] If they belong to different parishes it should be sent to the registrars of both.

SUBSECTION (4).—*Marriages contracted Abroad.*

944. The marriage of any Scottish subject which shall take place in any foreign country, if intimated to the Registrar-General within twelve months in accordance as near as may be with Schedule C of the Act of 1854, and duly certified by the British Consul of the county or district, shall be entered in "The Foreign Register."[5] The Registration of Births, etc. (Army) Act, 1879,[6] provides that where it appears from the registers kept for registering the marriages, etc., of officers and soldiers in the army and their families that any such officer or soldier is a Scottish subject, the Registrar-General in England shall, as soon as may be after receiving the register, send a certified copy of the entry relating to him to the Registrar-General in Scotland.

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[1] *Hamilton* v. *Wyllie*, 1827, 5 S. 716; Hume, i. 465; Fraser, H. & W. i. 257, 303.

[2] 6 Geo. V. c. 7, s. 3.

[3] *Ibid.*, s. 1.

[4] 17 & 18 Vict. c. 80, ss. 48, 49.

[5] 23 & 24 Vict. c. 85, s. 10.

[6] 42 Vict. c. 8.

SECTION 5.—NULLITY OF MARRIAGE.

SUBSECTION (1).—*Introductory.*

945. The various grounds upon which marriages may be pronounced null *ab initio* have a common element—the absence of genuine matrimonial consent. This may take the form of an impediment rendering consent impossible. The impediment may be absolute, such as permanent insanity or the subsistence of a prior marriage, or relative, such as consanguinity, or only temporary, such as want of residential qualification or nonage. Where there is no impediment genuine consent may be in fact absent, the formal consent having been induced by force, or fraud, or essential error.

SUBSECTION (2).—*Impediments to Marriage.*

(i) *Consanguinity and Affinity.*

946. Marriage is forbidden between persons who stand to each other within certain degrees of kin, and an alleged marriage between such persons will be declared a nullity. An action for that purpose is competent to either of the parties, to any third person shewing an interest, or to the public prosecutor.[1] The Act 1567 (c. 15) provided "that the holie band of marriage" . . . "be als lawful and als frie as the law of God has permitted," and declares "that secunds in degrees of consanguinitie and affinitie, and all degrees outwith the samin contained in the Word of the Eternal God, and that are not repugnant to the said Word, might and may lawfully marry." "Secunds" is a reference to the Canon-law method of reckoning degrees of kinship,[2] which is to count the number of generations to the common ancestor, and if the two lines are of different length to take the longer. "Secunds" therefore means first cousins.

947. The Act 1567, c. 14, declares incest punishable by death, and defines persons guilty of incest as such "as abuses their bodie with the persons in degrie as God in his Word has expressly forbidden in ony time coming, as is contained in the eighteenth chapter of Leviticus." These Acts were ratified by the Act 1581, c. 1. The Confession of Faith, which was made statute law by the Act 1690,[3] contains the following passage (c. 24, s. 4): "Marriage ought not to be within the degrees of consanguinity or affinity forbidden in the Word; nor can such incestuous marriages ever be made lawful by any law of man, or consent of parties, so as these persons may live together as man and wife. The man may not marry any of his wife's kindred nearer in blood than he may of his own, nor the woman of her husband's kindred nearer in blood than her own." The effect of the Acts of 1567 (c. 15) and 1690 is to import the eighteenth chapter of Leviticus as interpreted by the Confession of Faith.[1]

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[1] Fraser, H. & W. i. 74, 129, note (*a*); *Turner* v. *Meyers*, 1808, 1 Hag. Con. 414, note; *Andrews* v. *Ross*, 1888, 14 P.D. 15.

[2] *Purves's Trs.* v. *Purves*, 1895, 22 R. 513. See KINSHIP, Vol. VIII. p. 631, *ante*.

[3] Thomson's Acts, ix. 133.

948. In construing the Act 1567, c. 15, it has been decided, (1) that "the Act prohibits not only all marriages which are expressly prohibited in Scripture, but also all marriages which are repugnant to Scripture as being *in pari casu* with those prohibited; and (2) that, unless where distinguished in Scripture, relationship by affinity is, for the purposes of the Act, equivalent to relationship by consanguinity." [2] The result is that marriage is forbidden between ascendants and descendants *ad infinitum*, and in the collateral line between brothers and sisters, consanguinean or uterine, and between all collaterals one of whom stands *in loco parentis* to the other, *i.e.* is the brother or sister of a direct ascendant to the other, as uncle and niece, aunt and nephew, granduncle and grandniece, grandaunt and grandnephew.[3] The institutional writers are agreed that in estimating degrees it is immaterial that the relationship is only by the half-blood; [4] thus a man was convicted of incest for intercourse with the daughter of his deceased wife's half-brother.[5]

949. As to illegitimate relations the law is not settled. There is little doubt that a mother could not marry her illegitimate son, or a father his natural daughter. Fraser thinks it doubtful if a brother and sister born illegitimate are prohibited. But it is thought marriage between them would be forbidden as contrary to public decency.[6] In England it seems to be settled that when the natural relationship is established it has the same effect in creating impediments to marriage as if it sprung from a legal union.[7] In a recent case it was held in the Outer House that a marriage between a man and the illegitimate daughter of his deceased wife's sister was invalid.[8]

950. Affinity is not created by illicit connection,[9] and apparently it is not created by a marriage which is not consummated.[10] Affinity does not cease with the dissolution of the marriage which created it; so marriage with a deceased wife's niece is unlawful,[11] or with a deceased wife's aunt.[12] By the Deceased Wife's Sister's Marriage Act, 1907,[13] it was provided: "No marriage heretofore or hereafter contracted between a man and his deceased wife's sister, within the realm or without, shall be deemed to have been or shall be void or voidable, as a civil contract, by reason only of such affinity." In a case [1] where a woman, who had married her deceased sister's husband, died before the passing of the Act, it was held that her children had been legitimated. The Act prohibits (s. 3) marriage with the sister of a divorced wife during her lifetime, and adulterous connection with a wife's sister remains incestuous. The Royal Commission on Marriage Laws, 1868, found that the prohibited degrees of consanguinity and affinity were the same in all parts of the United Kingdom.[2] The legality of marriages celebrated here and not prohibited by our law, but prohibited by the personal law of one or both of the parties, will be dealt with below.[3]

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[1] *Fenton* v. *Livingstone*, 1861, 23 D. 366, per Lord Pres. M'Neill at p. 374.

[2] Per Lord Low in *Purves's Trs.* v. *Purves*, 1895, 22 R. 513, at p. 537.

[3] Stair, i. 4, 4; Ersk. i. 6, 8, 9; Bell's Prin., s. 1527; Fraser, H. & W. i. 119.

[4] Bankt. i. 5, 42; Stair, i. 4, 4; Ersk. i. 6, 9; Bell's Prin., ii. 1527.

[5] *Blair* in Hume, i. 450; and cp. *R.* v. *Brighton*, 1861, 1 B. & S. 447.

[6] Fraser, H. & W. i. 131; Ersk. iv. 4, 56; Alison, 565; Bankt. i. 5, 42; Macdonald, Criminal Law, 2nd ed., p. 219; see *Clarke* v. *Carfin Coal Co.*, 1891, 18 R. (H.L.) 63.

[7] *Horner* v. *Horner*, 1799, 1 Hag. Con. 337; *Woods* v. *Woods*, 1840, 2 Curt. 516; *R.* v. *Brawn*, 1843, 1 C. & K. 144; *R.* v. *St. Giles*, 1847, 17 L.J.Q.B. 81; *R.* v. *Brighton*, 1861, 1 B. & S. 447; *R.* v. *Chadwick*, 1847, 11 Q.B. 173.

[8] *Robertson* v. *Channing* (O.H.), 1928 S.L.T. 376.

[9] *Hamilton* v. *Wyllie*, 1827, 5 S. 668; Bell's Prin., s. 1527.

[10] Stair, i. 4, 6; Bankt. i. 5, 103; Fraser, H. & W. i. 106, 120, and authorities there cited.

[11] *Purves's Trs.*, *supra*.

[12] *Butler*, 1722, Gilbert's Folio Rep., 156.

[13] 7 Edw. VII. c. 47.

(ii) *Subsistence of Previous Marriage.*

951. A person already married cannot validly contract a second marriage until the first has been dissolved by death or divorce. The moment it is proved that a former marriage still subsists, even though it has never been consummated, an alleged second marriage becomes a nullity.[4] But a cohabitation, originally illicit because one of the parties is already married, may without any ceremony become a marriage, if the impediment is removed and the cohabitation is thereafter continued in circumstances which lead the Court to infer that the parties intended their intercourse to be matrimonial.[5] As an irregular marriage is, when proved, a marriage to all effects, it follows that a subsequent marriage, whether regular or irregular, will be annulled.[6]

952. In an action to find a second marriage invalid it is no defence that one or both of the alleged spouses were in the *bona fide* belief that the former marriage was invalid, or had never existed, or had been dissolved.[7] Even if a person has been convicted of bigamy it is open to him to prove the nullity of the earlier marriage in a civil action to establish the second.[8]

953. A husband who lies by and allows his wife to enter into a second marriage is not barred *personali exceptione* from having it declared a nullity.[9] Nor is a pursuer seeking to have his own second marriage annulled barred by evidence that he was aware of the invalidity, and deceived the woman by persuading her that she was entering into a valid marriage.[1] In an action to declare the validity of a marriage it is not necessary to call the husband or wife of the other alleged marriage,[2] but the Court would probably order intimation to be made.[3]

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[1] *In re Green*, [1911] 2 Ch. 275.

[2] Report, p. v; see also *Purves's Trs.* v. *Purves*, 1895, 22 R. at p. 536.

[3] See para. 979, *infra*.

[4] *Ballantyne* v. *Ballantyne*, 1866, 4 M. 494; *Petrie* v. *Ross*, 1896, 4 S.L.T. 63; Stair, i. 4, 6; Ersk. i. 6, 7; Fraser, H. & W. i. 135; Walton, H. & W., 2nd ed., p. 12.

[5] *Campbell* v. *Campbell*, 1866, 4 M. 867; 1867, 5 M. (H.L.) 115; *De Thoren* v. *Wall*, 1876, 3 R. (H.L.) 28, and para. 938, *supra*.

[6] *Richardson* v. *Irving*, 1785, Hume 361; *Kennedy* v. *Campbell*, 1751, 5 Bro. Supp. 789; 1753, 1 Pat. App. 519; *Wright* v. *Wright's Trs.*, 1837, 15 S. 767; *Macdonald* v. *Parkinson* (O.H.), 1905, 12 S.L.T. 710; cf. *Polack* v. *Shiels* (O.H.), 1912, 2 S.L.T. 239; Fraser, H. & W. i. 136.

[7] *Dalrymple* v. *Dalrymple*, 1811, 2 Hag. Con. 54, at p. 129; *Petrie* v. *Ross*, 1896, 4 S.L.T. 63; *Hunter* v. *Hunter*, 1900, 2 F. 771; *Miles* v. *Chilton*, 1849, 2 Rob. Ecc. 684; *Bonaparte* v. *Bonaparte*, [1892] P. 402; and see BONA FIDES, Vol. II. p. 278, *ante*; DIVORCE, Vol. VI. p. 6, *ante*.

[8] *Bruce* v. *Burke*, 1825, 2 Addams 471.

[9] *Dalrymple*, *supra*, at p. 129; *Napiers* v. *Napier*, 1801, Hume 367, at p. 372.

(iii) *Nonage.*

954. Pupils cannot marry, *i.e.* in Scotland males under fourteen and females under twelve.[4] If a pupil goes through the form of marriage and continues to cohabit after minority, marriage might be established, but this would be because there was evidence of consent after the impediment of nonage had ceased to exist.[5] In the case of *Johnston* it was held that a boy could not marry until he was actually fourteen years old. It was not enough to shew that he had then physical capacity to consummate marriage, or that the alleged marriage had been in fact consummated.

(iv) *Impotence.*

955. Either spouse may bring an action to have the marriage declared a nullity on the ground that the other spouse was at the time of the marriage, and still is, incapable of consummating it.[6] There is no authority in Scotland for the view that an action would be competent at the instance of the impotent party.[7] But in England an impotent wife who refused to undergo an operation which might have removed her incapacity has been granted decree of nullity.[8] Such an action by a third party would not be entertained.[9] It is thought that the action is only competent during the lifetime of both parties, subject to the possible right of an executor to continue an action begun before the pursuer died.[10]

956. There must be incapacity. Wilful refusal to perform the sexual act is not sufficient.[11] But the incapacity need not be incurable. If the evidence is that it might possibly be cured by an operation which the defender refuses to undergo, this may be sufficient.[1] There may be impotence though there is a possibility of partial sexual intercourse,[2] and it is sufficient to prove that the man was impotent *quoad hanc* though he might not be so *quoad* another woman,[3] for the ground of complaint is that the relation between the parties in the particular case is not a true marriage, inasmuch as it cannot be physically consummated. And where, as in the common case, there is no malformation, and impotence has to be inferred from non-consummation after opportunity, it is clearly impossible to prove that the man, *e.g.*, is necessarily impotent as to all women.[4] Where no structural defect in the wife is proved, but there has been continuous refusal by her to consummate, impotence may be inferred by the Court.[5] This rule has been extended in England to the case of the husband.[6] The Canon law requirement of triennial cohabitation has been departed from.[7] In one case the action was raised within six months of the marriage,[8] and in an English case impotence was inferred in circumstances where there had been an entire absence of cohabitation.[9]

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[1] *Miles* v. *Chilton*, 1849, 2 Rob. Ecc. 684; see *Bonaparte* v. *Bonaparte*, [1892], P. 402, and American cases in Bishop, Marriage and Divorce, i. s. 722; Fraser, H. & W. i. 138.

[2] *Jolly* v. *M'Gregor*, 1828, 3 W. & S. 85; *Wright* v. *Wright's Trs.*, 1837, 15 S. 767; *Dalrymple* v. *Dalrymple*, 1811, 2 Hag. Con. 54; Fraser, H. & W. i. 135.

[3] See C.A.S., B, i. 5.

[4] For a table giving the age of consent in the European states, see Hammick, Marriage Law of England, p. 386.

[5] Ersk. i. 6, 2; Fraser, H. & W. i. 51; *Johnston* v. *Ferrier*, 1770, Mor. 8931; see Bishop, Marriage and Divorce, i. 577.

[6] *C. B.* v. *A. B.*, 1884, 11 R. 1060; affd. 1885, 12 R. (H.L) 36; *A. B.* v. *C. B.*, 1906, 8 F. 603; *M.* v. *G.*, 1902, 10 S.L.T. 264; *A. B.* v. *C. D.*, 1863, 1 M. 1163.

[7] Fraser, H. & W. i. 98; Bell's Prin., s. 1524.

[8] *G.* v. *G.*, 1908, 25 T.L.R. 328.

[9] Fraser, Bell, *supra*; *A.* v. *B.*, 1868, L.R. 1 P. & D. 559.

[10] *Green* v. *Green or Borthwick*, 1896, 24 R. 211; *P.* v. *S.*, 1868, 37 L.J. P. & M. 80; *A.* v. *B.*, 1868, L.R. 1 P. & D. 559.

[11] *A. B.* v. *C. B.*, 1906, 8 F. 603; *H.* v. *P.*, 1873, L.R. 3 P. & D. 126; *Napier* v. *Napier*, [1915] P. 184; *F.* v. *P.*, 1896, 75 L.T. 192; *Finegan* v. *Finegan*, 1917, 33 T.L.R. 173.

957. There is no precise limit of age laid down by law, but it may safely be assumed that a marriage entered into by two old persons would not be annulled on this ground, at least unless there was actual malformation; for in the marriages of aged persons *potentia copulandi* is not an implied condition.[10] But a marriage between a man of fifty-four and a woman of forty-nine was annulled on the ground of the wife's impotence where there was malformation.[11]

958. If the parties are willing a remit is usually made to surgeons to examine them. Refusal to submit to examination will be held to be an admission of incapacity.[12] In England the Court will pronounce an order for inspection of parties who are within the jurisdiction. There is only one reported instance of such an order in Scotland and it was pronounced in a case in which the defender was insane.[13]

959. Decree will be refused if there are "facts and circumstances proved which so plainly imply on the part of the complaining spouse a recognition of the existence and validity of the marriage as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect."[1] The element of delay will enter into consideration,[2] but in itself it will not constitute a bar.[3] And the fact that the pursuer has a collateral motive is not a bar. In the case of *C. B.* v. *A. B.*[1] the wife successfully pleaded nullity as a defence to an action of divorce at the husband's instance on the ground of her adultery.

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[1] *L.* v. *L.*, 1882, 7 P.D. 16; *Williams* v. *Williams*, 1861, 2 S. & T. 240; and see *F.* v. *P.*, 1896, 75 L.T. 192.

[2] *Deane* v. *Aveling*, 1845, 1 Rob. Ecc. 279; *B—n* v. *B—n*, 1854, 1 Ecc. & Ad. 248; see *Hunt* v. *Hunt*, 1856, Dea. & Sw. at p. 129; Fraser, H. & W. i. 91.

[3] *A. B.* v. *C. D.*, 1902, 10 S.L.T. 264; *C.* v. *C.*, [1921] P. 399; *N.* v. *M.*, 1853, 2 Rob. Ecc. 625.

[4] See per Dr. Lushington in *N.* v. *M.*, 1853, 2 Rob. Ecc. at p. 635; and per Selborne L.C. in *C. B.* v. *A. B.*, 12 R. (H.L.) at p. 44; *H.* v. *P.*, 1873, L.R. 3 P. & D. 126.

[5] *A. B.* v. *C. B.*, 1906, 8 F. 603; *A. B.* v. *Y. Z.*, 1900 (O.H.), 38 S.L.R. 559; 8 S.L.T. 253; *G.* v. *G.*, 1871, L.R. 2 P. & D. 287; *S.* v. *A.*, 1878, L.R. 3 P. & D. 72; *F.* v. *P.*, *supra*; *E.* v. *E.*, 1902, 87 L.T. 149; *S.* v. *S.*, 1908, 24 T.L.R. 253; *Vickery* v. *Vickery*, 1921, 37 T.L.R. 332.

[6] *B.*, [1901] P. 39; *C.* v. *C.*, [1921] P. 399; *G.* v. *G.*, 1924 S.C. (H.L.) 42.

[7] *C. B.* v. *A. B.*, 1885, 12 R. (H.L.) 36.

[8] *A. B.* v. *Y. Z.*, *supra*; cf. *M.* v. *G.*, 1902 (O.H.), 10 S.L.T. 264.

[9] *W.* v. *S.*, [1905] P. 231.

[10] Stair, i. 4, 6, 4; Ersk. i. 6, 7; Fraser, H. & W. i. 93.

[11] *W.* v. *H.*, 1861, 2 S. & T. 240.

[12] Fraser, H. & W. i. 104; Fount. Dec. i. 274, 22nd July 1684; *W.* v. *S.*, [1905] P. 231.

[13] *A. B. or D.* v. *C. D.*, 1908 (O.H.), 15 S.L.T. 911.

(v) *Insanity.*

960. An insane person cannot give a valid consent, and therefore the insanity of either party is an impediment to marriage.[4] The question is, "Whether the defender was capable of understanding the nature of the contract she was entering into, free from the influence of morbid delusions upon the subject?"[5] If there is a return to sanity, and cohabitation is continued, there would be *prima facie* evidence of matrimonial consent tending to validate marriage.[6]

961. A declarator of nullity may be brought after recovery of sanity by the person who avers he was insane at the time of the alleged marriage.[7] If the insane person has been cognosced, the action may perhaps be brought by the tutor-dative.[8] If the party who was insane has recovered, it appears that during his lifetime no other person has a title to sue.[9] The action is competent at the instance of the sane party.[10] If the pursuer die after raising the action, it may be insisted in by the executor.[11] And after the death of either of the parties it seems that any person qualifying an interest could institute the action.[12]

962. The onus of proof lies on the party averring the insanity.[13] If, however, permanent insanity at a date prior to the contract be proved, the onus is shifted, and it will lie on the party averring that there had been a temporary recovery or lucid interval to make good that averment.[14] Undoubted insanity shortly after the marriage is not in itself sufficient to prove want of capacity at its date, but it will be a fact to be taken into consideration.[1] The existence of a child of the marriage is not a bar to decree being obtained.[2]

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[1] *C. B.* v. *A. B.*, 1885, 12 R. (H.L.) 36, per Lord Watson at p. 45; and see per Selborne L.C. at p. 38; Fraser, H. & W. i. 94.

[2] *C. B.* v. *A. B.*, *supra*, at p. 40.

[3] Fraser, *loc. cit.*; *B–n* v. *B–n*, 1852, 2 Rob. Ecc. 580, at p. 585; *L. or B.* v. *B.*, [1895] P. 274.

[4] Stair, i. 4, 6; Ersk. i. 6, 2; Fraser, H. & W. i. 55.

[5] Per Sir J. Hannen in *Hunter* v. *Edney*, 1881, 10 P.D. at p. 95; *Jackson* v. *Jackson*, [1908] P. 308; *Graham* v. *Graham*, 1907, 15 S.L.T. 33; *A. B. or D.* v. *C. D.*, 1908, 15 S.L.T. 911; *Park* v. *Park* (O.H.), 1914, 1 S.L.T. 88; *Durham* v. *Durham*, 1885, 10 P.D. 80; *Hancock* v. *Peaty*, 1867, L.R. 1 P. & D. 335.

[6] *Johnston* v. *Brown*, 1823, 2 S. 495 (N.E. 437); *De Thoren* v. *Wall*, 1876, 3 R. (H.L.) 28; *Campbell* v. *Campbell*, 1867, 5 M. (H.L.) 115; *Hill* v. *Hibbit*, 1870, 25 L.T. 183.

[7] *Turner* v. *Meyers*, 1808, 1 Hag. Con. 414; Fraser, H. & W. i. 74.

[8] *Thomson* v. *Thomson*, 1887, 14 R. 634; Fraser, *loc. cit.*

[9] *Turner* v. *Meyers*, *supra*.

[10] *Durham* v. *Durham*, *supra*; *Hunter* v. *Edney*, *supra*.

[11] *Green* v. *Green or Borthwick*, 1896, 24 R. 211.

[12] Fraser, H. & W. i. 75; *Christie* v. *Gib*, 1700, Mor. 6283; *Loch* v. *Dick*, 1638, Mor. 6278; *Turner* v. *Meyers*, *supra*, note on p. 415.

[13] *Durham* v. *Durham*, *supra*; *Cannon* v. *Smalley*, 1885, 10 P.D. 96.

[14] *Le Geyt* v. *O'Brien*, 1834, Milward Irish Ecc. Rep. 325; *Turner*, *supra*; Fraser, H. & W. i. 55.

(vi) *Non-residence in Scotland.*

963. The provisions of Lord Brougham's Act [3] requiring residence in Scotland by one of the parties to an irregular marriage for twenty-one days preceding the marriage have already been discussed.[4] This ground of nullity has been given effect in numerous cases of recent date following the case undernoted.[5]

(vii) *Pre-nuptial Adultery of Spouses.*

964. The Act 1600, c. 20, declares all marriages null which are contracted by divorced spouses with the persons "with quhome they are declarit be sentence of the ordinar judge to have committed the said cryme and fact of adultery." It further provides that the children of such an "unlawful conjunction" shall be "unhabill to succede as airs to thair saidis parentis." [6] To make such a marriage null, the name of the paramour must have been inserted in the decree dissolving the former marriage.[7] And probably "ordinar judge" would be held to mean "Lord Ordinary," and the Act would be treated as inapplicable where the divorce was pronounced by a foreign Court.[8] It is usual to omit the name of the paramour in a decree of divorce. Whether, when the name is given in the summons, the pursuer can insist on its being inserted in the decree has not been decided.

965. When the marriage of the divorced spouse with the paramour so named in the decree takes place in a foreign country, it is probable that the law of the foreign country would treat the marriage as valid, unless the same impediment was recognised by that law itself.[9] Fraser [10] goes further, and thinks the Scottish Court would not find the marriage null if contracted abroad though the paramour and the divorced spouse were domiciled in Scotland.[11] But the opposite was held by Lord Craighill in an unreported case.[12]

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[1] *Durham* v. *Durham*, 1885, 10 P.D. 80; *Cannon* v. *Smalley*, 1885, 10 P.D. 96.

[2] *Jackson* v. *Jackson*, [1908] P. 308.

[3] 19 & 20 Vict. c. 96.

[4] See para. 929, *supra*.

[5] *Miller* v. *Deakin* (O.H.), 1912, 1 S.L.T. 253; cf. *Bach* v. *Bach*, 1927, 43 T.L.R. 493.

[6] See Fraser, H. & W. i. 151; and as to the disability of the woman under the Act 1592, c. 119 (c. 11 in Thomson's ed.), to defeat the heirs in heritage, see *Irvine* v. *Skeen*, 1707, Mor. 6350 and 9471.

[7] More's Notes, p. 16; Riddell's Peerage Law, pp. 391, 410; Fraser, H. & W. i. 144; see *Beattie* v. *Beattie*, 1866, 5 M. 181; *Campbell* v. *Campbell*, 1866, 4 M. 867.

[8] More, Riddell, *supra*, whom Fraser cites without giving an opinion.

[9] Fraser, H. & W. ii. 1304; Westlake, Priv. Int. Law, p. 58; see *Scott* v. *Attorney-General*, 1886, 11 P.D. 128; *Kynnaird* v. *Leslie*, 1866, L.R. 1 C.P. 389; and see Walton, H. & W. 2nd ed., p. 331.

[10] Fraser, H. & W. ii. 1305.

[11] See opinions in *Beattie* v. *Beattie*, *supra*.

[12] *Stewart* v. *De Voto*, 1878, N.R., cited Mackay, Manual, p. 474; see *Brook* v. *Brook*, 1861, 9 H.L.C. 193; Walton, H. & W., 2nd ed., p. 332.

(viii) *Royal Marriage Act,* 1772.

966. By this Act[1] the descendants of King George II., other than the issue of princesses married into foreign families, are disabled from marriage unless they have first obtained the consent of the reigning sovereign. But if the descendant of George II. is over twenty-five years of age and gives notice of the intended marriage to the Privy Council, he may validly marry after twelve months without the consent of the sovereign, unless both Houses of Parliament shall have, within the twelve months, declared their disapprobation of the marriage (s. 2). The Act applies to a marriage celebrated abroad, though the marriage may be valid in the foreign country where it was contracted.[2]

Subsection (3).—*Absence of Genuine Consent.*

967. Where neither of the parties is subject to any incapacity and there is no impediment to their marrying each other, a marriage into which they purport to have entered may nevertheless be set aside on proof that they did not in fact exchange genuine matrimonial consent. The case of consent given in jest or for ulterior motives has been already dealt with.[3]

(i) *Intoxication.*

968. It is a ground of nullity that one of the parties was so intoxicated as to be bereft of reason at the time consent was supposed to be interchanged.[4] A marriage entered into in a state of drunkenness must be speedily disclaimed, or acquiescence and renewed consent will be presumed.[5]

(ii) *Force and Fear.*

969. There is no genuine consent if one of the parties was subject to such a degree of intimidation as to be no longer a free agent. The Court will look to the whole circumstances and actings of parties.[6] Threats may be enough without actual violence, provided they are enough to intimidate the *constans vir vel mulier*; but a threat by a man to blow his brains out if the woman did not marry him was not a sufficient ground for her getting the marriage annulled.[7] The case of *More* is apparently the only instance of a man getting a marriage annulled on this ground. In several recent English cases marriage has been annulled on this ground,[8] but in all of them the parties separated immediately after the ceremony, and the marriage was not consummated.

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[1] 12 Geo. III. c. 11.

[2] *Sussex Peerage* case, 1844, 11 Cl. & Fin. 85.

[3] See para. 912, *supra*.

[4] *Johnston* v. *Brown*, 1823, 2 S. 495 (N.E. 437); *Sullivan* v. *Sullivan*, 1818, 2 Hag. Con. 238, at p. 246; *Le Geyt* v. *O'Brien*, 1834, Milward Irish Eccles. Rep., p. 325.

[5] Fraser, H. & W. i. 72.

[6] Stair, i. 4, 6; Bankt. i. 5, 31; Fraser, H. & W. i. 444; *More* v. *M'Innes*, 1782, 2 Pat. 598; *Harford* v. *Morris*, 1776, 2 Hag. Con. 423.

[7] *Cooper* v. *Crane*, [1891] P. 369.

[8] *Scott* v. *Sebright*, 1886, 12 P.D. 21; *Bartlett* v. *Rice*, 1894, 72 L.T. (N.S.) 122; *Ford* v. *Stier*, [1896] P. 1.

The absence of *copula*, unless otherwise explained, is material as indicating that there had not been genuine and free consent to marriage.[1]

(iii) *Fraud or Essential Error.*

970. Like other contracts, marriage may be annulled if consent was given under essential error. Differing from other contracts, however, the only error which is held to be essential is error as to the identity of the other party to the contract, or as to the contract itself. Thus, if a person believes that he or she is marrying one person when, in fact, marrying another,[2] or that he or she was only entering into a betrothal and not a marriage, there is no contract.[3] It is hardly conceivable that such an error could occur without fraud on the part of the other contracting party.[4] Fraser says: [5] "It is agreed on all hands that an error as to any accidental quality, as the moral character, the fortune, and perhaps also the civil status of either of the spouses is not enough to form a nullity." Error as to the other spouse's name is not enough,[6] even where a name has been fraudulently assumed to induce the marriage.[7] Nor is it essential error if a man married a woman believing her to be chaste and finds her pregnant.[8]

971. So long as there is consent to marriage and no *error personæ*, fraud is not a ground of nullity. To affect the validity of a marriage, there must be "such fraud as procures the appearance without the reality of consent." [9] In Scotland there was formerly some difference of opinion as to whether fraud of a less radical kind might not afford a ground of nullity.[10] But "it is now authoritatively settled that by our law no marriage between parties who have validly consented to enter into the contract can be annulled on the ground of fraud on the part of one or both of the parties who entered into the contract." [11] Even where the allegation is of fraud such as to preclude consent, the fraudulent party will be barred *personali exceptione* from shewing that true consent was not interchanged.[12]

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[1] See per Lord Moncreiff in *Lockyer* v. *Sinclair*, 1846, 8 D. at pp. 615, 617; per Lord Brougham in *Swift* v. *Kelly*, 1835, 3 Knapp 257, at p. 284.

[2] *The Queen* v. *Millis*, 1844, 10 Cl. & Fin. at p. 785.

[3] *Valier* v. *Valier*, 1925, 133 L.T. 830; *Ford* v. *Stier*, [1896] P. 1; *Allan* v. *Young*, 1773, Ferg. Rep. 37; Fraser, H. & W. i. 457.

[4] Stair, i. 9, 9; i. 4, 6; *Wakefield* v. *Mackay*, 1807, 1 Hag. Con. 394, at p. 398; *Swift* v. *Kelly*, 1835, 3 Knapp 257, per Lord Brougham at p. 293.

[5] Fraser, H. & W. i. 448.

[6] *Cope* v. *Burt*, 1809, 1 Hag. Con. 434; *Wakefield* v. *Mackay*, *supra*; *Sullivan* v. *Sullivan*, 1818, 2 Hag. Con. 238.

[7] *M'Leod* v. *Adams* (O.H.), 1920, 1 S.L.T. 229.

[8] *Lang* v. *Lang*, 1921 S.C. 44; *Moss* v. *Moss*, [1907] P. 263.

[9] Per Sir F. Jeune in *Moss* v. *Moss*, *supra*.

[10] Cp. Stair, i. 9, 9, with Bankton, i. 5, 35, 36; *Wilson* v. *Horn*, 1904, 11 S.L.T. 702; *Stein* v. *Stein*, 1914 S.C. 903.

[11] *Lang* v. *Lang*, *supra*, per Lord Salvesen at p. 60.

[12] *Campbell* v. *Honyman*, 1831, 5 W. & S., per Lord Brougham at p. 146; *Bell* v. *Graham*, 1859, 3 Moo. P.C.C. 242; *Dalrymple* v. *Dalrymple*, 1811, 2 Hag. Con., per Lord Stowell at p. 107; *Dysart Peerage* case, 1881, 6 App. Cas., per Lord Watson at p. 548; Fraser, H. & W. i. 436.

SUBSECTION (4).—*Declarator of Nullity of Marriage.*

972. A declarator of nullity of marriage on the ground of any impediment, or want of consent, may be brought, not only by either of the parties, but also by any person having a patrimonial interest.[1] The only exception to this rule is an action of nullity on the ground of impotence, which can only be brought by one of the spouses. There is no example in Scotland of an action of nullity on this ground being entertained except at the instance of the injured spouse.[2] An action of nullity may be brought by the *curator bonis* of a lunatic who has gone through the ceremony of marriage.[3] A woman entrapped into a marriage with a man already married is entitled to damages against the person who entrapped her.[4] Proof must be led in actions of nullity as in other consistorial actions. The admissions of the defender alone will not warrant decree.[5] The Court may order intimation of the action to the Lord Advocate, and he may appear and defend in the public interest.[6]

SUBSECTION (5).—*Putting to Silence.*

973. An action of putting to silence to negative a marriage of which there is a *fama* may be brought by the aggrieved person. It is a consistorial action.[7] The defence may be either a denial of the statements attributed to the defender or an averment of marriage. The latter defence may be entertained without the necessity for a separate declarator of marriage, and decree in the action will be *res judicata* between the parties on the question of their marriage.[8] A conclusion for damages may be added, but damages will not be awarded if the pursuer's conduct has contributed to the *fama*.[9] Proof must be led.[10]

SUBSECTION (6).—*The Effects of a Decree of Nullity.*

974. A decree of nullity of marriage pronounced by a competent Court being a judgment determining *status* is equivalent to a judgment *in rem.*[11] The marriage is declared null *ab initio* for all purposes,[12] and there is, so far as possible, *restitutio in integrum.*[13] Where a woman was under the penalty of losing a marriage-contract provision if she remarried, it was held by Lord Guthrie that it was not "remarriage" for her to have contracted a marriage which was afterwards annulled.[1] If the nullity is declared on the ground of pre-nuptial adultery of the spouses, she cannot dispone her heritage to her pretended husband or the children of that marriage, in prejudice of the heirs of the first marriage or her own heirs.[2]

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[1] Fraser, H. & W. ii. 1244.

[2] Bell's Prin., s. 1524; Hume, i. 456.

[3] *Parnell* v. *Parnell*, 1814, 2 Hag. Con. 169, at p. 170.

[4] *Clark*, Oct. 18, 1728, MSS. Con. Decreets; *Mackenzie* v. *Macfarlane*, 1891, 5 S.L.T. 292.

[5] 11 Geo. IV. & 1 Will. IV. c. 69; Maclaren, Practice, p. 717.

[6] 24 & 25 Vict. c. 86, s. 8; *Paul* v. *Paul*, 1896, 4 S.L.T. 171.

[7] Maclaren, Practice, pp. 61, 716.

[8] *H.* v. *R.*, 1844, 16 Sc. Jur. 576; *Longworth* v. *Yelverton*, 1862, 1 M. 161; 1864, 2 M. (H.L.) 49; Fraser, H. & W. ii. 1246.

[9] *Longworth* v. *Yelverton*, *supra.*

[10] *A. B.* v. *C. D.*, 1901, 8 S.L.T. 406; *Williams* v. *Forsythe*, 1909, 2 S.L.T. 252.

[11] *Administrator of Austrian Property* v. *Von Lorang*, 1927 S.C. (H.L.) 80; *Nutford* v. *Nutford*, [1923] P. 130; *Pemberton* v. *Hughes*, [1899] 1 Ch. 781.

[12] *A. B.* v. *C. B.'s Trs.*, 1907, 15 S.L.T. 108, 908; *Niboyet* v. *Niboyet*, 1878, 4 P.D. 1, per James L.J. at p. 9.

[13] Ersk. i. 6, 43; Stair, i. 4, 20; Fraser, H. & W. i. 49; *Wilkie* v. *Wilkie*, 1908, 45 S.L.R. 451; *Wright* v. *Sharp*, 1880, 7 R. 460, at p. 464.

975. If both, or even one, of the parties entered into the second marriage in the *bona fide* belief that it was genuine, the children may be declared legitimate.[3] The *bona fides* must spring from an error as to fact and not as to law; *e.g.*, it would not be relevant to aver that there was *bona fides* because the parties honestly believed that they might lawfully marry each other, although the woman was the niece of the man's deceased wife, and they were aware of their relationship by marriage. But a man would be in *bona fide* if he went through a ceremony of marriage with a woman, not knowing her to be the niece of his deceased wife.[4]

SECTION 6.—INTERNATIONAL ASPECTS OF MARRIAGE.

976. In order that a marriage contracted abroad may be recognised as valid in this country and *vice versa*, certain requirements of law must be observed.

SUBSECTION (1).—*Form of Marriage.*

977. In point of form or ceremony the marriage must satisfy the law of the country where it was entered into, *i.e.* the *lex loci contractus*.[5] A marriage by repute without any ceremony whatever, if valid by the law of the spouses' domicile, will be recognised here.[6] The marriages of British subjects abroad, unless celebrated in accordance with the forms of the *lex loci*, must conform to the rules and regulations laid down by the Foreign Marriages Acts, 1892 [7] and 1906,[8] and the Order in Council under the latter Act dated 22nd November 1913. The Act of 1892 [7] provides, "All marriages between parties of whom one at least is a British subject solemnised in the manner in this Act provided in any foreign country or place by or before a marriage officer within the meaning of this Act shall be as valid in law as if the same had been solemnised in the United Kingdom with a due observance of all forms required by law" (s. 1). The Act and the relative Order in Council[1] contain provisions as to notice and as to ceremony. Where only one of the parties is a British subject the Marriage Office must be satisfied either that the other is not a citizen of this country or, if so, that sufficient facilities do not exist for solemnisation in accordance with the *lex loci*. A marriage under the Act may be solemnised on board one of His Majesty's ships on a foreign station (s. 12).[2]

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[1] *A. B.* v. *C. B.'s Trs.*, 1907, 15 S.L.T. 108, 908.

[2] Act 1592, c. 11.

[3] *Petrie* v. *Ross*, 1896, 4 S.L.T. 63; authorities cited in *Purves's Trs.* v. *Purves*, 1895, 22 R. 513, at pp. 524, 534.

[4] *Purves's Trs.* v. *Purves*, *supra*; and cp. *Whitworth* v. *Whitworth*, [1893] P. 85.

[5] *Nutford* v. *Nutford*, [1923] P. 130; *Brook* v. *Brook*, 1861, 9 H.L.C. 193; *Dalrymple* v. *Dalrymple*, 1811, 2 Hag. Con. 54; *Bell* v. *Graham*, 1859, 13 Moo. P.C.C. 242; *Scrimshire* v. *Scrimshire*, 1752, 2 Hag. Con. 395; *M'Cullock* v. *M'Cullock*, 1759, 2 Pat. 33; *Beattie* v. *Beattie*, 1866, 5 M. 181; Fraser, H. & W. ii. 1309; Walton, H. & W., 2nd ed., p. 315 *et seq.*; Westlake, Priv. Inter. Law, s. 15.

[6] *In re Green*, 1909, 25 T.L.R. 222.

[7] 55 & 56 Vict. c. 23.

[8] 6 Edw. VII. c. 40.

978. In barbarous countries where there is no recognised system of law a marriage where one of the parties is a domiciled Scot will be valid if entered into in Scottish form.[3]

SUBSECTION (2).—*Capacity of Parties.*

979. In respect of contractual capacity of parties the marriage must satisfy not only the *lex loci contractus*,[4] but also the law of the spouses' domicile.[5] Where the domicile of the parties is different—one being Scottish and the other foreign—and the marriage takes place in Scotland, the contractual capacity will be regulated by Scots law.[6] Consent of parents or guardians has been held to be a matter of ceremony and not of contractual capacity, and therefore absence of such consent is not treated by our Courts as a ground of nullity.[7] If two foreigners celebrate in Scotland a marriage which would be incestuous or otherwise *contra bonos mores* by Scots law, though lawful by the law of their own domicile, the marriage would be invalid here.[8] On the other hand, as Professor Dicey says,[9] "A marriage celebrated in England is not invalid on account of any incapacity which, though imposed by the law of the domicile of both or of either of the parties, is of a kind to which our Courts refuse recognition." Thus if a Hindu marry a British subject in this country he cannot afterwards be heard to plead that his religion prevented him from marrying outside his own caste.[10] Penal statutes imposing contractual disabilities will not be valid beyond the jurisdiction of the country which imposes them.[11] There seems to be some doubt whether a marriage between a guilty spouse domiciled in Scotland and the paramour named in the decree would be recognised as valid if celebrated in England or some other country where such disability does not exist. Probably it would be recognised as valid in the *locus contractus*, but not in Scotland.[12]

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[1] S.R. & O., 1913, p. 382.

[2] *Culling* v. *Culling*, [1896] P. 116.

[3] See Walton, H. & W., 2nd ed., p. 326 *et seq.*

[4] *Sottomayor* v. *De Barros*, 1879, 5 P.D. 94; *Ogden* v. *Ogden*, [1908] P. 46.

[5] *Brook* v. *Brook*, 1861, 9 H.L.C. 193.

[6] *Sottomayor*, *supra*; *Ogden*, *supra*; *Mette* v. *Mette*, 1859, 1 S. & T. 416; *Nutford* v. *Nutford*, [1923] P. 130.

[7] *Ogden*, *supra*; *Compton* v. *Bearcroft*, 1769, 2 Hag. Con. 444; *Fenton* v. *Livingstone*, 1859, 3 Macq. at p. 535.

[8] *Brinkley* v. *Attorney-General*, 1890, 15 P.D. 76.

[9] Conflict of Laws, 2nd ed., p. 634.

[10] *Chetti* v. *Chetti*, [1909] P. 67.

[11] *Scott* v. *Attorney-General*, 1886, 11 P.D. 128; *Kynnaird* v. *Leslie*, 1866, L.R. 1 C.P. 389.

[12] See Mackay's Manual, p. 474, footnote.

SUBSECTION (3).—*Jurisdiction.*

(i) *Declarator of Marriage.*

980. The Court has jurisdiction to declare a marriage (1) where the domicile of the man is in Scotland, (2) where the marriage took place in Scotland and the defender is resident and personally cited there.[1] In *Murison's* case it was admitted that at the date of the alleged interchange of consent *per verba de præsenti* the defender was domiciled in Scotland, but he had acquired a domicile in Natal before the action was brought, and he had not been personally cited in Scotland. The Court held that it had no jurisdiction to entertain the action.

(ii) *Declarator of Nullity.*

981. The Court of the domicile of the man has jurisdiction to declare the nullity of a marriage between him and a woman who sues him there,[2] although the marriage was celebrated in another country.[3] If a woman cohabits with a man as his wife she acquires his domicile, and this rule is not affected by the fact that she afterwards discovers the marriage to be invalid and seeks to have it annulled.[4] The opinion has been expressed that if she remains in the place of her own domicile at the date of the marriage she may raise the action there, since it implies the contention that she has retained her domicile.[5] In England it has been held repeatedly that the Court has jurisdiction to declare a marriage null if it was celebrated there though neither party is domiciled there.[6] These decisions have been followed in Scotland [7] and in Ireland,[8] and it is thought that they would still be followed notwithstanding the decision in *Murison.*

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[1] *Murison* v. *Murison*, 1923 S.C. 624; *Wylie* v. *Laye*, 1834, 12 S. 927.

[2] *C. B.* v. *A. B.*, 1884, 11 R. 1060; 1885, 12 R. (H.L.) 36; *A. B.* v. *Y. Z.* (O.H.), 1900, 38 S.L.R. 559; *Bater* v. *Bater*, [1906] P. 209.

[3] *Lawford* v. *Davies*, 1878, 4 P.D. 61.

[4] *Turner* v. *Thompson*, 1888, 13 P.D. 37.

[5] Duncan and Dykes on Jurisdiction, p. 193; Gillespie's Bar, p. 390; *Wilson* v. *Horn* (O.H.), 1904, 41 S.L.R. 312; 11 S.L.T. 702.

[6] *Ogden* v. *Ogden*, [1907] P. 46; *Simonin* v. *Mallac*, 1860, 2 S. & T. 67; *Sottomayor* v. *De Barros*, 1877, 3 P.D. 1; *Linke* v. *Van Aerde*, 1894, 10 T.L.R. 426.

[7] *Miller* v. *Deakin* (O.H.), 1912, 1 S.L.T. 253; *Wilson* v. *Horn*, *supra.*

[8] *Sproule* v. *Hopkins*, 1903, 2 I.R. 133.

MARRIAGE CONTRACT.

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PART I—ANTENUPTIAL CONTRACTS.

Section 1.—Introduction.

982. The term "marriage contract" is strictly applicable only to a pre-nuptial bilateral deed executed by intending spouses, and it may be also by others, in which are contained the provisions, made upon the marriage, by the two sides of the house. It is usual to find also discharges of legal rights and, if circumstances require, the constitution of a trust or of trusts, with more or less elaborate declarations regarding the powers and immunities of the trustees. That is the ordinary type of contract of marriage. But it is not uncommon to find the provisions by each side of the house contained in a separate instrument, and this is frequently very appropriate if the intending spouses are of different nationalities or even domiciles. Even, however, where there are two separate instruments it is usual and desirable that each should contain a reference to the other and that both deeds should be signed by all the parties. But though neither of these conditions be fulfilled two deeds may make one marriage contract.[1] A deed has none the less the special virtue of an antenuptial marriage contract though it relates to the intended wife's estate only, and the intending husband is joined as a consenter and to discharge his legal rights in his wife's estate.[2]

983. Pre-nuptial settlements have never been common in Scotland except within a limited social class, and later experience shows that their sphere tends to contract rather than to expand. Prior to modern legislation, so far as the purpose of such a deed would have been to protect the wife's own estate, the then prevailing sentiment, as applicable to the great majority of cases even where the wife had personal estate or expectations, was that the situation was reasonably met by the operation of the *jus mariti* which then effected the transfer of such estate to the husband absolutely. Thus Menzies,[1] writing about the middle of the nineteenth century, says, "The usual settlement of the wife's property is simply to convey it to the husband"; and Montgomerie Bell,[2] still later, says, "Where the wife's property is not of large amount with reference to the position of the parties, and where the husband is making suitable provisions in favour of his wife, and giving full security to her, it is a very common, and I think a reasonable, arrangement for the wife to convey to her husband *simpliciter* whatever property, heritable or moveable, she has at the time and all that shall fall to her during the subsistence of the marriage."

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[1] *Williamson* v. *Boothby*, 1890, 17 R. 927; *Wilken's Trs.* v. *Wilken*, 1904, 6 F. 655.

[2] *Wilken's Trs.* v. *Wilken*, *supra*.

984. The situation is now materially affected by the modern statutory protection of the property of married women [3] and the recognition of their full contractual and dispositive powers without the consent or knowledge of their husbands.[4] But these statutory provisions leave untouched the necessity, where it exists, of the wife's protection against herself, which has always been recognised as one of the main reasons for a strict pre-nuptial settlement, with the intervention of trustees, to protect, not only the wife's own estate, but also the provisions conceived in her favour by her husband. Another main purpose of an antenuptial contract of marriage is to restrict the operation of the legal rights of spouse and children.

985. Postnuptial *inter vivos* settlements are commonly spoken of as postnuptial marriage contracts, but the language is not very accurate, and different considerations apply to such settlements. Opinions differed in the House of Lords on the question whether a contract of marriage adjusted before marriage, and signed on the marriage day but after the ceremony, was in law antenuptial.[5]

SECTION 2.—GENERAL ASPECTS.

SUBSECTION (1).—*Capacity of the Parties.*

986. The capacity of the parties is determined by their respective domiciles at the date of the contract. One practical illustration is that by the law of England and Ireland a minor cannot make a valid contract, and this incapacity is not cured by the marriage being celebrated in Scotland or by the residence of the spouses here.[5] But it is understood that there are means by which in certain cases this difficulty can be got over, and in these cases advice will be obtained in England or Ireland. In the case of Scottish minors the ordinary rules of contract apply, it being kept in mind that marriage is itself always a highly onerous consideration. In one case, where the wife had at marriage been nineteen years of age, she, when she attained majority, and with consent of her husband, brought an action to reduce her antenuptial marriage contract on the grounds of minority and lesion enorm; the only lesion averred was that she had been deprived of the power of free disposal of her estate; the action was dismissed as irrelevant.[1] In such a case it ought to be regarded as essential that the lady shall be separately advised. And even when she is major the same rule of practice ought to be followed; as to which reference is made to observations by Lord Salvesen in a case where the contract was presented to the lady and signed by her, without her having been advised or having even had the deed in draft for consideration.[2]

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[1] Menzies' Lectures, 1856 ed., p. 434.

[2] Bell's Lectures, 3rd ed., p. 907.

[3] Married Women's Property (Scotland) Act, 1881 (44 & 45 Vict. c. 21).

[4] Married Women's Property (Scotland) Act, 1920 (10 & 11 Geo. V. c. 64).

[5] *Cooper* v. *Cooper*, 1888, 15 R. (H.L.) 21.

SUBSECTION (2).—*Errors in Execution.*

987. After marriage has followed on the faith of the document it is useless to attempt to challenge it on the ground of defective execution, *e.g.* that the notary who signed for the wife was the law agent of the husband,[3] which may, indeed, not be a valid objection at all. But in any case the rule goes much further. An antenuptial contract of marriage neither holograph, nor adopted as holograph, nor tested, would be unchallengeable between the parties or by them jointly, after the *rei interventus* of marriage. It might be that from the conveyancing standpoint, and particularly in regard to heritable property, matters would require to be put into more formal shape. The case would not fall under s. 39 of the Conveyancing Act, 1874, but both parties would be compellable, *e.g.* at the instance of any trustees under the deed, to perfect the informal conveyancing.

SUBSECTION (3).—*Errors in Substance.*

988. "The Court of Session does not possess the power, which is often exercised with advantage by courts of equity elsewhere, of reforming a marriage settlement so as to bring its provisions into conformity with the stipulations by which the spouses intended to be bound." [4] Thus when in an antenuptial contract of marriage there had been a failure in draughtsmanship which resulted in no provision being made for the case which happened—the death of the husband survived by widow and children—the defect was held to be incurable and the settlement collapsed.[5] A like decision was given in a similar case [6] where it was observed that, before the actual provision as it stands in the deed will be extended by implication from other clauses in the deed to a case which it does not in terms cover, the inference must be very clear. That is to say, unless the result can be reached by a (possibly benign) construction of what is in the deed, it cannot be reached at all, for there is no jurisdiction to proceed, by rectification, to insert what is not there. Where the rights of children are not involved, either because no provision was made for children or because of the failure of children, it may be open to the spouses to execute a postnuptial deed admitting an essential error in their antenuptial contract, and therefore revoking it to the extent of rectifying the error, and substituting clauses in accord with the actual matrimonial intention.[1] But even in that case it is interesting and important to see the view which was taken by the Court. At a still later stage the husband made a will purporting to dispose of his estate in a manner inconsistent with the second (the rectifying) deed. At the suit of the surviving wife that will was reduced on the reasoning that the provisions in the antenuptial contract (admittedly not in accord with the true intention of the spouses) had nevertheless, as they stood in the antenuptial deed, been contractual, and that therefore the second deed was also contractual and must receive effect.

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[1] *Jack* v. *Boyd*, 1899, 7 S.L.T. 164.

[2] *Motherwell* v. *Motherwell's Trs.*, 1906, 14 S.L.T. 167.

[3] *Lang* v. *Lang's Trs.*, 1889, 16 R. 590.

[4] Lord M'Laren in *Ferguson's Curator bonis* v. *Ferguson's Trs.*, 1893, 20 R. 835.

[5] *Scott's Trs.* v. *Scott*, 1902, 10 S.L.T. 122.

[6] *Dolphin's Trs.* v. *Baxter*, 1888, 15 R. 733.

SUBSECTION (4).—*Benignant Construction.*

989. Menzies writes:[2] "This is a deed in which the Court will not allow the plain intention of the parties, fairly deducible from the general nature of the contract, to be defeated by critical objections. The highly onerous character of the mutual considerations inductive to the contract of marriage obtain for it, and for those whose rights depend on it, a favourable regard and construction." Perhaps it does not amount to more than that the Court will be specially anxious to repair blunders in conveyancing if any aid in that direction can be found within the deed itself. Thus security given to trustees was held to extend to provisions for children, though the language suggested that it was limited to the widow's annuity.[3]

SUBSECTION (5).—*Questions with Creditors.*

990. It appears that the fact that the husband was insolvent at the date of the marriage is not a ground for attacking provisions made by him in an antenuptial contract of marriage, if not exorbitant, and if the wife is not a conscious party to a fraud on his creditors.[4] In the case cited the husband's estate was sequestrated within three months after the marriage. In that case opinions were reserved as to what the result might have been if the creditors had claimed only partial reduction, and *contra* whether reduction *quoad excessum* of an antenuptial contract of marriage is competent. In an earlier case the wife at the date of the marriage was debtor in a bond for £468, and, without making any provision for that debt, she executed a contract of marriage in which she conveyed to trustees heritage, which was her whole estate, in trust for herself and her husband in alimentary liferent, and for the children of the marriage and her husband's children by a previous marriage in fee; it was held that the trust was not reducible by the creditor, reserving any claim competent to him against the income of the settled property in respect of the wife's reserved liferent.[1]

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[1] *Ferguson's Curator bonis* v. *Ferguson's Trs.*, 1893, 20 R. 835.

[2] Lectures, p. 659.

[3] *Fraser* v. *Hastings*, 1874, 11 S.L.R. 499.

[4] *M'Lay* v. *M'Queen*, 1899, 1 F. 804.

Subsection (6).—*Defeasible Settlements.*

991. Even an antenuptial marriage contract may have such incidents as will result in its own undoing. A formal and elaborate contract of marriage, with full matrimonial trusts, contained also a reserved power to the wife, under which the trustees were bound, when required by her, to pay to her, for the purpose of purchasing a family residence and furniture, "or for any other purpose, such amount of the trust funds" as she should name. It was held[2] that the trustees were bound to pay to her, on her demand, the whole estate settled by her, notwithstanding that the deed provided that, if a house was purchased, it was to form part of the trust estate and the title was to be taken in name of the trustees. The settlement could not have stood against the creditors of the wife, and even if a house had been purchased in the name of the trustees, it would in turn have fallen under the reserved power of denuding. The same result in effect was reached where the trustees were authorised to hand the whole estate to the husband on the joint request of the spouses, and they were from the outset a majority of the trustees.[3] The suggestion was that such a condition of affairs amounted to a fraud on the principle of effective trust protection, for whenever the spouses wanted to spend capital in disregard of the trust, they were in a position to do so in fact; whereas if any creditor wanted to reach the same capital, he was to be met with the pretence of the sanctity of a trust fund. In another case where, in her antenuptial contract of marriage, the wife's estate was settled for the non-alimentary liferent of her husband and, subject thereto, for her and her heirs, the trustees, on demand of the spouses, were ordered to denude in respect that there was no matrimonial purpose to be protected.[4] In like manner where the wife granted a general conveyance to trustees upon trust to hold £5000 on proper matrimonial trusts for the spouses and survivor in liferent, and the issue in fee, and to hold the residue for herself and her heirs and assignees, except that if the husband should be the survivor he should liferent one-half of the residue, and the husband renounced this latter right, the trustees were ordained to denude in favour of the wife of the whole estate except £5000.[1] With this case contrast those mentioned below.[2]

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[1] *Watson* v. *Grant's Trs.*, 1874, 1 R. 882.
[2] *Fowler's Trs.* v. *Fowler*, 1898, 25 R. 1034.
[3] *M'Callum* v. *M'Culloch's Trs.*, 1904, 7 F. 337.
[4] *Laidlaw* v. *Newlands*, 1884, 11 R. 481.

SUBSECTION (7).—*Intention.*

992. Testamentary intention is one thing; contractual intention is another thing. "The true point of enquiry in all doubtful cases [of contract] is not, as in a will, the intention of one party, but that meaning of the terms made use of which the adverse party understood, and on which he was entitled to rely." [3] In a case regarding a contract of marriage, Lord President Inglis said that the element of intention must be treated, not as in a will, but as in the case of any other onerous contract.[4] The intention of the parties as to the law which shall regulate the construction and legal effect of a contract of marriage, when the spouses are of different domicile, may, in the absence of an express clause,[5] be presumed from such facts as the form and language of the deed, the domicile of the trustees, the place of execution, and (but *quære*) the subsequent recording of the deed.[6] A question of intention may arise in regard to provisions in the deed in favour of parties beyond the marriage consideration, and to come into operation only on failure of the proper matrimonial purposes, *e.g.* an ultimate destination of the wife's estate to her next of kin or to the next of kin of both spouses. A destination of that kind has a testamentary quality, but it may have also a contractual quality between the spouses; [7] in the former case the intention to be ascertained is the testamentary intention of the spouse whose estate is in question; in the latter case it is the contractual intention of both spouses.[8]

SUBSECTION (8).—*The Trusteeship.*

993. Lord M'Laren formulated the dictum: [9] "It is essential to the constitution of an effective marriage contract trust that at least one of the trustees should be a neutral person"; and apparently it was intended to be understood that "neutral" meant more than merely not one of the spouses. If sound in law this might have an application not limited to marriage contracts. Whether sound or not, or of general application or not, it may be admitted to be of sound counsel. Another matter affecting the trusteeship of marriage trusts is the power of the spouses to appoint new trustees when the trusteeship has lapsed.[10] From the *dicta* in *Newlands's* case it appears that each spouse and the surviving spouse has the like power as regards the trust created by him or her, but no further; and it should follow that the same rule would apply in favour of any third party who had in the marriage contract created a separate trust. But it is not to be assumed in any of those cases that the power would transmit to representatives after death. When both spouses were in life a petition to the Court for new trustees was dismissed as unnecessary.[1] In those cases the parties making new appointments cannot give the new trustees a title to the assets, and that must be obtained by appropriate conveyancing method. Trustees named in a contract of marriage ought always to give a written acceptance of office immediately after the marriage, even though there are no immediate duties, nor any present assets. It prevents all misunderstanding in any case, while if there are present assets it gives a clear warrant for having the trustees infeft or having any assignation intimated on their behalf.

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[1] *Ramsay* v. *Ramsay's Trs.*, 1871, 10 M. 120.

[2] See paras. 1053 and 1125, *infra*.

[3] Bell's Prin., s. 524 (8).

[4] *Higginbotham's Trs.* v. *Higginbotham*, 1886, 13 R. 1016.

[5] *Corbett* v. *Waddell*, 1879, 7 R. 200; Dicey, Conflict of Laws, p. 654; *Turman* v. *Fitzgerald*, [1904] 1 Ch. 573.

[6] *Corbett* v. *Waddell*, *supra*.

[7] See para. 1002, *infra*.

[8] *Lister's Judicial Factor* v. *Syme*, 1914 S.C. 204.

[9] *M'Callum* v. *M'Culloch's Trs.*, 1904, 7 F. 337.

[10] *Newlands* v. *Miller*, 1882, 9 R. 1104. Cf. *Glentanar* v. *Scottish Industrial Musical Association*, 1925 S.C. 226.

SECTION 3.—LEGISLATIVE REFERENCES TO MARRIAGE CONTRACTS.

994. It seems useful to collect instances of statutory reference to contracts of marriage. Even where in the instances which follow the word "antenuptial" does not occur, it is thought that it is implied. In the case under the Bankruptcy Act that is immaterial, for postnuptial marriage contracts are brought in by the conjoined words. In like manner, in the case of inhibitions, both antenuptial and postnuptial contracts are covered.

SUBSECTION (1).—*Married Women's Property* (*Scotland*) *Act*, 1881.[2]

995. This Act by s. 1 abolished the *jus mariti* and, to a certain extent, the husband's right of administration, but subs. (5) of that section provides that "nothing herein contained shall exclude or abridge the power of settlement by antenuptial contract of marriage"; and by s. 8 it is enacted that "This Act shall not affect any contracts made or to be made between married persons before or during marriage or the law relating to such contracts."

SUBSECTION (2).—*Married Women's Property* (*Scotland*) *Act*, 1920.[3]

996. By s. 1 of this Act there is conferred on married women full contractual and dispositive powers without their husband's consent; and then by s. 6 it is enacted that, subject to the provisions of s. 1 of the Act, nothing contained in the Act shall apply to any provision conferred or reserved in any antenuptial contract of marriage, whether dated before or after the Act, all which shall be as "valid and irrevocable" as if the Act had not been passed.

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[1] *Lindsay* v. *Lindsay*, 1847, 9 D. 1297.

[2] 44 & 45 Vict. c. 21.

[3] 10 & 11 Geo. V. c. 64.

SUBSECTION (3).—*Descent of an Entailed Estate.*

997. By the Entail Amendment Act, 1848[1] (s. 8), it was provided that if, with reference to an estate held under an "old" entail, the heir in possession or the heir apparent, together or separately, had "by obligation in any marriage contract secured the descent of the estate upon the issue of the marriage, it should not be competent for the granter or granters of the obligation to apply for or consent to disentail, except in one of the following cases: (1) if a child was born of the marriage capable of taking the estate under the obligation, and who by himself or his guardian consented to the disentail; or (2) if the marriage was dissolved without such a child being born; or (3) if the trustees under the marriage contract consented. The Entail Act, 1882 (s. 17), has a similar provision applicable to all entails, but limited to "marriage contracts entered into prior to the passing of the present Act." The expression "any marriage contract" points to the obligation being given on the marriage of the granter of the obligation or on the marriage of his son.[2]

SUBSECTION (4).—*Entail Provisions to Younger Children.*

998. In terms of the Entail Provisions Act, 1824[3] (the Aberdeen Act), s. 4, the beneficiaries of provisions granted to younger children must survive the granter of the provisions or be *in utero* at his death, with an exception in favour of any predeceasing child whose share may have been settled in his or her marriage contract with consent of the granter of the provisions.

SUBSECTION (5).—*Contingent Interests in Bankruptcy.*

999. By the Bankruptcy (Scotland) Act, 1913[4] (s. 97 (4)), it is provided that the act and warrant of confirmation in favour of the trustee shall *ipso jure* transfer to and "vest" in him, to the effect mentioned in the Act, any non-vested contingent right of succession or interest in property conceived in favour of the bankrupt under the will or settlement of any person deceased, or under marriage contract, or under any other deed, instrument, or writing of an irrevocable nature.

SUBSECTION (6).—*Inhibitions.*

1000. The words "marriage contract" do not occur, but marriage contracts are covered by the expression "deed of entail or similar indefeasible title" in s. 157 of the Titles to Land Consolidation Act, 1868,[5] which deals with inhibitions. That section enacts that inhibitions shall not affect *acquirenda*, with an exception in the case of estate which, at the date of recording the inhibition, is destined to the inhibited person by an entail or similar (similarly) indefeasible title. All inhibitions are now subject to the limitation as regards their duration contained in s. 44 (3) (*a*) of the Conveyancing (Scotland) Act, 1924.[1]

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[1] 11 & 12 Vict. c. 36.

[2] *Lockhart*, 1909, 1 S.L.T. 36.

[3] 5 Geo. IV. c. 87.

[4] 3 & 4 Geo. V. c. 20.

[5] 31 & 32 Vict. c. 101.

SECTION 4.—MARRIAGE CONSIDERATION: TESTAMENTARY: CONTRACTUAL.

1001. In determining the obligations and rights arising under antenuptial marriage contracts, three general considerations require attention: (1) whether the claimants are within what is called the consideration of marriage; (2) whether the provisions are testamentary; or (3) whether they are contractual; and among these three considerations there is a good deal of cross-division. The intending spouses and the children and remoter issue [2] of the intended marriage are within the consideration of marriage; different views have been indicated as to whether the issue, by a previous marriage of the settlor [3] or of the other spouse,[4] are within that consideration; other parties are not, *e.g.* other named relatives of either spouse [5] or the heirs or personal representatives of either spouse.[6] Yet it does not follow that all provisions in favour of even immediate issue of the intended marriage are irrevocable. Thus substitutions among sons in the case of the settlement of a landed estate by the father are liable to be defeated by the joint act of the father and the eldest son for the time being, though without a vested right.[7] Conversely a provision may be irrevocable though the object is not within the marriage consideration as when the capital of the settled fund is destined to the children of the intended marriage and those of the settlor's previous marriage, the children of both marriages being placed on exactly the same platform at least as to the quality, though not necessarily as to the quantity, of their provisions.[8] This will hold even though the view be taken that the children of the previous marriage are not within the marriage consideration. It results from the community of interest and identity of treatment, whereby it is held that all the beneficiaries so massed get the benefit of the ranking to which the children of the marriage are entitled. The same rule holds though the incorporated objects are not the settlor's children but are, *e.g.*, the children of the other spouse.[9] It matters not that no children are born of the marriage on the occasion of which the settlement is made.[10]

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[1] 14 & 15 Geo. V. c. 27.

[2] *Macdonald* v. *Hall*, 1893, 20 R. (H.L.) 88; *Hughes* v. *Edwards*, 1892, 19 R. (H.L.) 23.

[3] *Mackie* v. *Gloag's Trs.*, 1884, 11 R. (H.L.) 10; *Barclay's Trs.* v. *Watson*, 1903, 5 F. 926; *Leslie's Trs.* v. *Leslie*, 1921 S.C. 740.

[4] *Montgomerie's Trs.* v. *Alexander's Trs.*, 1911 S.C. 856.

[5] *Barclay's Trs.* v. *Watson*, *supra*; *Eadie's Trs.* v. *Henderson*, 1919, 1 S.L.T. 253.

[6] *Lord Advocate* v. *Stewart*, 1906, 8 F. 579; *Duff's Tutor* v. *Phillipps*, 1921 S.C. 287.

[7] See para. 1039, *infra*.

[8] *Mackie* v. *Gloag's Trs.*, 1884, 11 R. (H.L.) 10; *Allan's Trs.* v. *Allan's Trs.*, 1907, 15 S.L.T. 73; *Leslie's Trs.* v. *Leslie*, *supra*.

[9] *Leslie's Trs.* v. *Leslie*, *supra*.

[10] *Mackie* v. *Gloag's Trs.*, *supra*; *Allan's Trs.* v. *Allan's Trs.*, *supra*.

1002. Notwithstanding the generality of the *dicta* which have been delivered, it is not to be assumed that the same rule would necessarily hold in an extreme case such as the capital being destined one-half to the children of the marriage and the other one-half to a specified charity. By its very essence the rule has no application when the capital is destined, first, to the children of the marriage and, failing them, to the other parties, for in this case the latter are substitutes.[1] Provisions to parties beyond the marriage consideration, and made in such terms as not to be within the benefit of such cases as *Mackie*, are testamentary and therefore, in the general case, revocable.[2] This covers parties brought in under the ultimate trust purpose in a general conveyance by the wife, *e.g.* her named relatives or her heirs or personal representatives. That is to say, those parties have no *jus quæsitum*, and no opposition by them can affect an express or implied revocation by the wife. But even wills may have contractual elements, and it is to be remembered that, according to the ordinary framework of an antenuptial contract of marriage, the whole deed bears to be a contract between the spouses. That does not go so far as to require the husband's consent to revocation by the wife of such an ultimate gift by her to her own side of the house or to anyone on whose behalf it is not to be assumed that the husband has contracted. But the contractual element does function in two different ways; (1) in favour of the husband when the ultimate destination of the wife's fund is partly in favour of his side of the house; in that case the spouses jointly can defeat it without consent of the beneficiaries, but not the wife alone; [3] and (2) in favour of the wife to the effect that, though the ultimate destination is in favour of the wife's own side of the house, it bars any claim by the husband to *jus relicti*, though not expressly renounced, for that claim would cut in upon the ultimate gift to which the husband, as a party to the marriage contract, has agreed.[4]

SECTION 5.—ABSOLUTE TRANSFERS.

1003. It sometimes happens that the only provision made on the marriage takes the form of an immediate and out-and-out transfer by the husband to the wife of stock exchange securities to a certain value. This has its advantages, but it is also attended by several objections. The wife obtains no protection against herself, which in any individual case may or may not be a serious objection. There is also the difficulty of the relation of such a provision to the wife's claim for legal rights if she should survive her husband, but that can easily be disposed of by the simplest antenuptial agreement or discharge. Absolute transfers in such circumstances are exempt from the 1 per cent. stamp duty imposed by s. 74 of the Finance (1909–10) Act, 1910; the stamp is only 10s. on each deed of transfer. That is so even though the actual granting of the transfers should be postponed till after the marriage, if there is clear pre-nuptial evidence of an undertaking to make the provision. In an actual case of this kind, where the transfers were dated after the marriage, and owing to misunderstanding the 1 per cent. *ad valorem* stamp duty had been paid, the large excess payment was refunded by Somerset House on production of a letter, dated prior to the marriage, which proved the agreement.

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[1] *Dyer* v. *Carruthers*, 1874, 1 R. 943; *Montgomerie's Trs.* v. *Alexander's Trs.*, 1911 S.C. 856.

[2] *Eadie's Trs.* v. *Henderson*, 1919, 1 S.L.T. 253, and cases in last note.

[3] *Ferguson's Curator bonis* v. *Ferguson's Trs.*, 1893, 20 R. 835.

[4] *Murray's Trs.*, 1901, 3 F. 820; *Smart* v. *Smart's Trs.*, 1926 S.L.T. 227.

SECTION 6.—PROTECTED LIFE POLICIES.

1004. The only form of provision or settlement which is within the financial power of many men on marriage is a policy of life assurance. In this connection the Married Women's Policies of Assurance Act, 1880,[1] is important. It provides (s. 2) special and valuable protection for any policy (including an endowment policy[2]) effected by a married man on his own life and declared upon the face of it to be for the benefit of his wife, or of his children, or of his wife and children. As the enactment applies only to policies effected by a married man (which, however, includes a widower[3]), it may seem to be inapplicable to antenuptial arrangements. But it is a simple matter to have a very brief antenuptial agreement for the effecting of the policy after the marriage, and the medical examination and all the other necessary arrangements may also be made before marriage. As compared with the effecting before the marriage of a policy not under the Act of 1880 there are advantages in favour of the procedure under that Act. In the former case there may be difficult questions of delivery, and even though antenuptial there may in some cases arise questions of excess provision or of the intending husband's insolvency when the provision was made,[4] or when the premiums were paid; also there may be the legal expenses of creating a trust. All these matters are helpfully disposed of by s. 2 of the 1880 Act. A policy effected in terms of that section constitutes a trust in the person of the husband or of any trustee he may appoint: the provision is not reducible on any ground of excess or insolvency; and the only events in which (even in postnuptial cases) creditors can attack it are (1) when they are able to discharge the *onus* of proving the concurrence of both the following facts, namely (*a*) that the policy was effected with intent to defraud creditors, and (*b*) that premiums have been paid with the like intent; or (2) when the husband is made bankrupt within two years after the date of the policy. Even in those two events, and even in postnuptial cases, the limit of the remedy open to the creditors is to claim repayment of the premiums "so paid" from the trustee of the policy out of the proceeds of the policy.

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[1] 43 & 44 Vict. c. 26.

[2] *Chrystal's Trs.* v. *Chrystal*, 1912 S.C. 1003.

[3] *Kennedy's Trs.* v. *Sharpe*, 1895, 23 R. 146.

[4] *M'Lay* v. *M'Queen*, 1899, 1 F. 804.

1005. In the case of such a policy taken out as a provision on a particular marriage the wife will be named in it, and if children are to be objects of the provision, they will be the children of that marriage only. The wording of these policies ought to receive the closest attention on all matters affecting the definition of the beneficial interests, *e.g.* whether the wife is to take an immediate and absolute interest, or an interest contingent on her surviving her husband, and whether fee or liferent, and generally the question of ranking between her and the children; also the question of vesting of the children's rights if any, and whether grandchildren are to be objects of the trust; it may be that the special virtue of the 1880 Act cannot extend beyond immediate children. The husband may reserve to himself wide powers, and these may be expressed in the policy.

1006. It is a disadvantage that there is no obligation on the husband to pay the premiums. It has been held that the wife cannot deal with her interest during the subsistence of the marriage even with her husband's consent;[1] but *quære* whether this is now law.[2] The trustee may surrender the policy to the assurance company for its surrender value.[3]

SECTION 7.—UNILATERAL ANTENUPTIAL DEEDS.

1007. The question has frequently arisen whether a unilateral deed, executed before and in contemplation of marriage, by one of the spouses—usually the wife—is or is not revocable after the marriage has taken place. It cannot be said that the decision of this question is affected by the fact that a trust is constituted, or by the presence of a clause in the deed declaring it to be irrevocable. The important factors are the presence or absence of a contractual element; whether the trusts are of a matrimonial nature; whether there is a *jus quæsitum* in children or other parties, and a surprising degree of importance appears to attach to the consideration whether a child has been born before, and is in life when, steps are taken to claim revocation. As to whether the purposes are matrimonial or not, what is meant is, not so much who are the interested beneficiaries, as whether the provision, *e.g.* for children, flows from the joint matrimonial agreement and resolution of the intending parents. But a settlement of which the only purpose is for the alimentary behoof of the granter and any children that may be born to her, though executed in contemplation of marriage, is not a proper matrimonial settlement and is revocable.[4]

1008. In the earliest of the modern cases[5] the pre-nuptial deed by the lady was of the nature of a bond of interdiction, contemplating marriage, and providing for children, but not contemplating any particular marriage. After marriage, but before any child was born, the spouses claimed revocation; thereafter, before decision, a child was born. The Court held that the wife could revoke, at least to the effect of making a reasonable provision for her husband. It was remarked that, if the child had been born before the claim to revoke, revocation might have been barred. A right of total revocation was affirmed by the Court in another case where the deed by the wife had been signed the day before the marriage; the circumstances resembling those of the earlier case except that no child had been born.[1] The same result followed in a third case,[2] notwithstanding that the deed was declared to be irrevocable, and had been homologated by the husband after the marriage; a deed of revocation had been executed before the birth of a child, but there was a child before action commenced. The same doctrine was recognised in the involved case of *Sawrey-Cookson.*[3]

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[1] *Scottish Life Assurance Co.* v. *Donald*, 1901, 9 S.L.T. 200.

[2] Married Women's Property (Scotland) Act, 1920 (10 & 11 Geo. V. c. 64).

[3] *Schumann* v. *Scottish Widows' Fund*, 1886, 13 R. 678.

[4] *Stevenson* v. *Stevenson's Trs.*, 1905, 13 S.L.T. 457.

[5] *Mackenzie* v. *Mackenzie's Trs.*, 1878, 5 R. 1027.

1009. On the other hand the attempts to revoke have failed in the following circumstances—(1) a trust deed by the wife, expressly in contemplation of marriage, but not declared irrevocable; the deed was delivered and acted on by the wife and the trustees, money being paid over in implement; the purposes were for the granter in liferent and the children in fee; the attempt to revoke was after the husband's death when there were children in life;[4] (2) a pre-nuptial settlement of *acquirenda* by the wife after her engagement, on ordinary matrimonial trusts, the children's right to capital being subject to a power of apportionment by the spouses or the survivor; the deed was declared irrevocable; the trustees obtained possession of and administered funds falling under the settlement; and the attempt to revoke was after the birth of a child;[5] (3) a settlement expressly in contemplation of a specified marriage, on trust for the lady's alimentary liferent, power to her to create a liferent in favour of the husband if surviving, with capital to the children, whom failing to a named niece of the lady; the trustees had taken possession; there were no children; the claim to revoke was refused mainly on the ground of a *jus quæsitum* in the niece, though it was observed that that would not have barred revocation if the marriage had not taken place.[6] This principle of a *jus quæsitum* in parties other than the children of the marriage is exemplified in cases in which it has been held that provisions in a marriage contract in favour of children of a former marriage were irrevocable,[7] but these were cases where the parties were in the deed treated as institutes on the same platform as the children of the marriage, which was not the position in *De Pitchford.*

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[1] *Watt* v. *Watson*, 1897, 24 R. 330; also *Russell* v. *Lawson*, 1897, 5 S.L.T. 209.

[2] *M'Gregor* v. *John*, 1908, 15 S.L.T. 926.

[3] *Sawrey-Cookson* v. *Sawrey-Cookson's Trs.*, 1905, 8 F. 157.

[4] *Middleton's Trs.* v. *Middleton*, 1909 S.C. 67.

[5] *Lyon* v. *Lyon's Trs.*, 1901, 3 F. 653.

[6] *De Pitchford* v. *Robertson*, 1918, 2 S.L.T. 276.

[7] *Mackie* v. *Gloag's Trs.*, 1884, 11 R. (H.L.) 10; *Allan's Trs.* v. *Allan's Trs.*, 1907, 15 S.L.T. 73.

SECTION 8.—PHASES OF GENERAL CONVEYANCES.

SUBSECTION (1).—*Settlement of Conquest.*

1010. This subject is further considered below in relation to the wife's part of what may be regarded as at least one of the standard forms of the modern marriage contract.[1] The fact, however, is that the settlement of an entire or limited *universitas* is an institution of very old date and has its origin in provisions made by the husband for wife and children. A common form in olden times was a settlement by the husband of the conquest of the marriage. That appears to have been considered a reasonable and natural standard, having regard to the then state of the law with reference to the property of married women, taken along with the fact that it commonly happened that the making and preserving of the conquest of the marriage was largely due to the wife, which was recognised in a Scottish proverb, quoted from the Bench in one of the cases, that no man can become rich unless his wife lets him. A settlement of conquest is now unknown, nor is it likely that in practice it will be found necessary to deal with any such case, but in those settlements is found the root idea of more modern general settlements or conveyances, and it is helpful to note some of the qualities of such a provision.

1011. A settlement of conquest in its usual form was not made through trustees. There might be words purporting to effect a conveyance, but in substance it was more of the nature of an obligation. It conferred no active rights on anyone during the husband's life. The husband remained undivested owner,[2] with uncontrolled powers of administration and alienation, but he was not entitled to commit frauds upon the settlement, and a case of that kind would have been presented by a gratuitous transaction which was so conceived as to be operative only after his death, leaving his own beneficial enjoyment unaffected during his lifetime.

SUBSECTION (2).—*Other Forms.*

1012. It is further helpful to give consideration to various important forms of general settlements more modern than the provision of conquest. Decisions upon such forms are a step in the development of the subject. The cases quoted below are mostly, but not wholly, instances of such settlements by the husband, in which respect they resemble the old settlement of conquest. With one exception they are all cases of direct settlement without the intervention of trustees. They illustrate variations of language where it may be doubted whether there was any real intention which would justify those variations. They shew that failure to think out in advance what is intended, and to express it carefully and accurately, may naturally lead to litigation. They shew also that there is said to be recognised in the law a special technical rule of construction of such general conveyances, which may make it dangerous to rely literally on specialties of language in any particular contract of marriage.

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[1] See para. 1055, *infra*.

[2] Cf. *Arthur and Seymour* v. *Lamb*, 1870, 8 M. 928.

1013. In an antenuptial marriage contract each of the intending spouses conveyed to the other the liferent of all estate "pertaining and belonging or that shall pertain and belong to them or either of them at the dissolution of the marriage." No question would have arisen if the provision had been limited to a grant of liferent to the surviving spouse of all estate which should pertain to the predeceaser at the dissolution of the marriage; in other words, if "pertaining and belonging or" had been omitted from the settlement. But the argument was that the presence of those words imported something more than would have been effected without them. The suggestion was that those words *ab initio* earmarked for the purpose of the settlement all estate belonging to either of the spouses at the date of the marriage, and consequently restricted the spouses' powers with reference to those assets. That contention was overruled, and the general subject was reviewed from the Bench. The leading opinion, given by Lord Curriehill, was emphatically concurred in by Lord President Inglis, especially with reference to the expression of the law regarding the construction of general settlements in marriage contracts. Lord Curriehill said: "The subjects disposed of by the clause are of two descriptions, the first being the *acquisita*, or what already belonged to the spouses at the date of the marriage. . . . According to the literal reading of this clause it comprehended only what belonged to the spouses at the former or what should belong to them at the latter of those two dates. What might be acquired during the intermediate period is not included unless it should also continue to belong to one of the parties at the dissolution of the marriage. . . . But such clauses in deeds of the class to which this belongs are not to be interpreted according to the literal meaning of the words. In Scots conveyancing technical meanings have by long usage come to be attached to certain words very different from their literal meaning. . . . From a very remote period a peculiar technical meaning has been given to marriage contracts when the subject conveyed is, not a specific article of property, but a *universitas*. . . . When a *universitas* is provided by an antenuptial marriage contract to the wife and children even *per verba de præsenti* the rule is that the husband remains the absolute owner with right of administration and power of disposal for onerous causes, and even gratuitously, unless his alienation be of such a character as to be a fraud on the marriage contract."[1]

1014. By an antenuptial contract of marriage the husband disponed to his wife in liferent only, and to the children of the marriage in fee, all estate "at present belonging to him or which he may afterwards succeed to or which may pertain and belong to him at the time of his death." Here there appear to be three sections of the settlement as compared with two in the case of *Champion*. The following quotation is from the judgment of Lord President Inglis: "In short, it is the entire estate he (the husband) may have at his death. The effect of a settlement of that kind is perfectly well settled in law. Although it is in form a conveyance it is truly only an obligation which is not prestable during the life of the husband and father, and arises first upon his death. He has in the meantime the full disposal of his estate, and his onerous contracts must receive effect against the rights of his children which will not receive effect until his death. The right of the children is not a *jus crediti*, but merely a right to so much of his estate as shall be left at his death. It is no doubt a universal right, but it does not arise till the death of the father." [1]

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[1] *Champion* v. *Duncan*, 1867, 6 M. 17.

1015. In an antenuptial contract of marriage the wife conveyed to her husband the whole means and effects "now belonging or indebted and owing to her and all that she may acquire or succeed to during the subsistence of the said intended marriage, or that shall be belonging owing and indebted to her at her death." The judgment of Lord President Inglis is specially valuable as dealing with the alleged threefold character of a settlement in such terms. His lordship said: "The trustees of the husband contend that there are three different branches of this conveyance: (1) what she was possessed of at the marriage; (2) all she might acquire during the marriage; (3) all belonging to her at her death. I do not think that is a sound construction. Undoubtedly there is a distinction between the first subject conveyed and the second; what she had at her marriage is one subject, what she acquired during it is another. But in what remains of the clause there is no conveyance in distinct terms of anything which is to be acquired by her between the termination of the marriage by the decease of the husband (if that should happen) and her own death. It is not what she might acquire during that period that is conveyed, but only things which might belong to her at her death. These will comprehend the two former classes, things possessed by her at and during the marriage if not consumed or expended by her; and it is therefore open to us to say that when she speaks of things belonging to her at her death she is not necessarily speaking of subjects separate and distinct from those which belonged to her at her marriage and those which she might acquire during her marriage, but that the more natural construction is that the words are merely applicable to the two sets of things already specially conveyed — that is, that it shall be a condition of her husband taking these things that they shall be her property at her death." [2]

1016. In *Wyllie's Trs.* v. *Boyd* [3] the general conveyance was through the medium of trustees. The husband conveyed to the trustees all estate "now belonging or which shall be belonging to him at his decease." The following quotation is from Lord Kinnear's judgment: "I cannot say that I agree with the Lord Ordinary in thinking that this is a conveyance of *acquisita et acquirenda* in the ordinary technical signification of these words, because that would mean that the husband had given the marriage contract trustees, not only everything of which he was possessed at the date of the contract, and everything in addition which he might leave at his death, but also anything which he might acquire in any manner of way during the intermediate period between the marriage and his death, so as to deprive himself of all right of property and all power of control over other property that might come to him during the intermediate period. I do not think that that is the meaning of the conveyance. . . . He does not deprive himself of any right of property or power of control in subjects he may acquire after the date of the marriage contract during his lifetime, and accordingly the property which belongs to him at his death and which he has acquired after the date of the marriage contract will be subject to all the debts which he may have contracted during his lifetime."

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[1] *Haldane* v. *Hutchison*, 1885, 13 R. 179.

[2] *Russell's Trs.*, 1887, 14 R. 849.

[3] 1891, 18 R. 1121.

1017. In an antenuptial contract of marriage the wife conveyed to her husband in liferent only and to the children of the marriage in fee "the whole estate that may belong to her at the time of her death." This is much the simplest of all the reported cases. It does not even purport to convey anything by way of *de præsenti* operation. On the contrary, the description of the estate conveyed is exactly what would be found in a testamentary instrument. Being an antenuptial contract of marriage the document was *inter vivos*, onerous, and irrevocable. The specification of the subject of settlement was in one sense wider than is commonly found in contracts of marriage, for there was no limitation to estate which was vested in the wife at the date of the marriage or which might have become vested in her at the dissolution of the marriage, and any implication in favour of that restriction was displaced by the express words of the deed. There was, therefore, a binding settlement in favour of the family of all property which might belong to the wife at the date of her own death, and it mattered not that she survived her husband for many years. But, on the other hand, she remained absolute owner, and therefore with uncontrolled powers of administration and *inter vivos* disposal, both onerously and gratuitously, subject only to the fetter implied by law against any fraud upon the settlement.[1]

SECTION 9.—PROVISIONS FOR THE WIFE.

SUBSECTION (1).—*Mourning*.[2]

1018. A sum will be specified and it will bear to be for mourning for the widow and children of the marriage living in family with her. It may be that general creditors of the widow could attach the money, at least when it is for her mourning only, and therefore it may be preferred to make the provision through trustees, with power to them to apply the money for the specific purpose intended. A general discharge of legal rights does not cover mourning.[1]

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[1] *Haggart's Trs.* v. *Haggart*, 1895, 22 R. 625.

[2] *Barlass* v. *Barlass's Trs.*, 1916 S.C. 741.

SUBSECTION (2).—*Interim Aliment.*

1019. A sum provided for the widow under this head is intended to cover the period between the husband's death and the first term's payment of any annuity or liferent also provided for the widow, and generally, to meet inevitable special expenditure of a transition period. It ought, therefore, to be liberally fixed in relation to the husband's establishment and fortune, and not to the widow's future position.[2] A sum which seemed suitable at the date of the marriage may be very inadequate, or the reverse, at the date of the husband's death. The subject received much consideration in the case cited.[3] An alternative is to provide for the maintenance of the establishment on the accustomed scale up to the first term of Whitsunday or Martinmas occurring six months after the husband's death.

SUBSECTION (3).—*Residence.*

1020. The first question is, whether what is to be provided is a right of liferent or a right of occupancy.[4] Even if a liferent, it may or may not be effected by an immediate infeftment contingent on viduity; there may be merely an obligation to provide a house. In the former case the husband will grant warrandice even though there is existing debt, so that it may be clear that the widow is entitled to be relieved of all debt, interest as well as principal. Other matters are: (1) whether the house should be put into a complete state of repair at the beginning of the trust; (2) the incidence of ground burdens, repairs, and taxes, and rates (owners' and occupier's). As to repairs two things should be noted: (*a*) it seems that the word "repairs" by itself alone does not cover painting, papering, or decoration unless expressly expanded; and (*b*) if the widow is to be relieved of repairs, or repairs and decoration, it is desirable to insert words entitling her to have the house and pertinents maintained in a reasonable state of repair and decoration; and (3) fire and other insurances. The right will be declared alimentary, and to make this effectual the provision will be made through trustees.[5] It is suggested that it should be in the option of the husband, or of his heir or other representative (or at least of the husband) to provide an additional yearly annuity of stated amount in lieu of the specific liferent, on condition that it be sufficiently secured to the satisfaction of the trustees. This will protect the wife or widow, and yet enable the husband (or his successors) to deal with the property. If the clause of option is to extend at all to the husband's successors, it may be preferred that it should take the form of a mere power to the trustees, with consent of the widow, to release the specific property on obtaining satisfactory security in the names of the trustees for a substituted alimentary annuity.

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[1] *Griffith's Trs.* v. *Griffith*, 1912 S.C. 626.

[2] *Baroness de Blonay* v. *Oswald's Reps.*, 1863, 1 M. 1147.

[3] *Barlass* v. *Barlass's Trs.*, 1916 S.C. 741.

[4] *Milne's Trs.* v. *Milne*, 1920 S.C. 456.

[5] *Forbes' Trs.* v. *Tennant*, 1926 S.C. 294.

Subsection (4).—*Furniture, etc.*

1021. It is natural and usual to give the widow a right of some sort in furniture and other effects which go to constitute the husband's establishment as at the time of his death. The language used to describe the scope of the subject-matter sometimes requires careful consideration,[1] *e.g.* motor-cars with their accessories and garage equipment. The provision may be either absolute in the event of the wife surviving her husband, or only a liferent or right of use for the remainder of her life, or for widowhood. In the case of a liferent or use it is desirable to provide for an inventory on handing over to the widow, but negativing any duty on the part of testamentary trustees to inquire further and also any liability on the part of the widow to account strictly or to replace articles worn out. Also in liferent cases it may seem reasonable that the widow should be bound to insure at her own expense in the names of herself and her husband's representatives for their respective interests. But if in the same contract there is a provision of a house in regard to which the widow is relieved of the insurance premiums, the same line will naturally be followed in regard to the probably smaller items of furniture insurance. Besides, it will probably be found that the more satisfactory arrangement is that the estate should pay and bear the premiums. To this whole furniture, etc., clause, a useful adjunct sometimes is a reservation to the husband's estate of an option to pay to the widow a lump sum at the death of the husband.

1022. When questions regarding furniture arise with third parties there is usually the difficulty of no ostensible change in the possession. A husband conveyed his furniture, pictures, etc. to trustees in his antenuptial marriage contract; then he delivered some of the pictures to a creditor in security; the latter was preferred because he had taken the pictures for value and in good faith.[2] The result was otherwise where the conveyance to the marriage trustees was made by arrangement with creditors, and for the wife in liferent and the children in fee; this was on the ground that the trustees had been in civil possession through the wife.[3] It is recognised that the position may have been improved in the wife's interest by the Married Women's Property Acts of 1881 and 1920.[4]

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[1] *Tod's Trs.* v. *Finlay*, 1872, 10 M. 422.

[2] *Hewat's Trs.* v. *Smith*, 1892, 19 R. 403.

[3] *Mitchell's Trs.* v. *Gladstone*, 1894, 21 R. 586.

[4] Goudy on Bankruptcy, 3rd ed., p. 325; 4th ed., p. 298. See Lord Kyllachy in *Mitchell's Trs.* v. *Gladstone*, *supra*, at p. 588.

The most recent case[1] was in Glasgow Sheriff Court: there was no challenge of the good faith of the spouses: and the wife's claim to the household furniture was preferred in competition with the trustee in the husband's sequestration. The wife claimed by virtue of a *de præsenti* conveyance by the husband to her, without the intervention of trustees, in an antenuptial marriage contract of the furniture then belonging to him or to be acquired by him: the furniture in dispute had largely been purchased by the husband during the marriage, and it was used by both spouses in the family home.

SUBSECTION (5).—*Interim Possession.*

1023. Experience suggests that, whatever may be the position as to provision or non-provision of liferent or other rights in residence and furniture, it ought to be provided that the widow shall not be disturbed in free occupancy for a reasonable period after the death, even concurrently with payment of a sum for interim aliment. In the absence of a special provision, this is usually adjusted out of good feeling; but not always. It is understood that there is a custom, having the force of a rule, that the widow of a landed proprietor, whether under entail or not, shall not be turned out of the house before, nor even immediately after, the funeral. She cannot be made to pay "rent."

SUBSECTION (6).—*Wife's Liferent.*

(i) *Alimentary Protection.*

1024. There are here dealt with liferent interests in favour of the wife or widow whether in her own estate brought into settlement or in funds settled by her husband. These interests ought to be declared to be alimentary, which requires a trust.[2] The following expressions in this connection in marriage contracts have been held ineffectual (1) "for the maintenance and aliment of the surviving spouse and also for the maintenance, aliment, and education" of the children;[3] (2) a statement that the beneficiary shall not have power to charge the income by way of anticipation;[4] (3) an exclusion of all rights of creditors; it being held that these words did not exclude alienation, it followed in law that creditors could attach.[5] The word "alimentary" by itself alone is in practice regarded as sufficient, but, on the other hand, it is not essential; thus it is enough to say "exclusion of her acts and deeds and the diligence of her creditors"[6] or "for support and maintenance."[7] The alimentary protection is effectual, during the subsistence of the marriage, even as regards the liferent of the wife's own estate,[1] and it was in *Murray's* case suggested that the protection might continue even after her husband's death if there were young children dependent on her. On the other hand, no such clause will be effectual even during marriage, nor with reference to the wife's liferent of either spouse's estate, in such a case as *M'Callum.*[2] Where an alimentary liferent has been effectually created, it does not merge in the fee in the event of the liferentrix afterwards acquiring the fee, but on the contrary the alimentary liferent subsists as a fetter and a protection.[3]

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[1] *Rubin* v. *Rubin's Tr.*, 1929 S.L.T. (Sh. Ct.), 44.

[2] *Forbes' Trs.* v. *Tennant*, 1926 S.C. 294.

[3] *Dunsmure's Trs.* v. *Dunsmure*, 1920 S.C. 147; *M'Murdo's Trs.* v. *M'Murdo*, 1897, 24 R. 458; but see *Arnold's Trs.* v. *Graham*, 1927 S.C. 353.

[4] *Mackie's Judicial Factor*, 1920, 2 S.L.T. 95.

[5] *Douglas Gardiner & Mill* v. *Mackintosh's Trs.*, 1916 S.C. 125.

[6] *Dewar's Trs.* v. *Dewar*, 1910 S.C. 730.

[7] *Arnold's Trs.* v. *Graham*, *supra*.

(ii) *Joint Liferent.*

1025. If funds are settled for the spouses in liferent, the income to be paid on their joint receipt, the wife is entitled to receive and discharge one-half of the net income, where the husband has been sequestrated[4] or is in desertion.[5]

(iii) *Apportionment.*

1026. It is understood that the practice is to ignore, in marriage contracts, the matter of apportionment or non-apportionment of income; also to ignore apportionment in operation at the start of the wife's liferent of her own estate; but to recognise it at the close of that liferent; also both at the start and at the close of any liferent provided to her in her husband's estate after his death; also on the occasion of changes of investments as regards both estates. It is thought that, notwithstanding the absence of any clause negativing apportionment, it is correct to let the wife receive all dividends and other income on her own estate becoming payable after the date of the marriage, though the period of accrual may have been partly or wholly prior to that date. The contrary view would be that it is the duty of the trustees to impound as settled capital all income so far as accrued at the date of the marriage; but that view is excluded by the decisions which limit general conveyances to capital sums[6] and probably the correct view is that, as regards the income in question, the lady is not divested by the contract of marriage, and that it falls to her as unsettled.[7]

SUBSECTION (7).—*Annuity.*

(i) *From Widows' Fund.*

1027. Where the husband is a member of any institution or society having a widows' fund, arrangements will be made for payment by the husband, before or immediately on the marriage, of marriage and age taxes. It may also be matter of stipulation that he shall at once commute all future contributions to the fund. If not, and if security is being created for any additional annuity, that security may be so expressed as to cover those contributions. There will be estate duty payable by the widow on the value of the annuity as an estate by itself. There is no reason why the husband should not bind himself to relieve her of that duty and of all other death duties in respect of the annuity and of the obligation of relief. Experience shows that those values are often taken at much too high figures, especially if the annuity is to cease on remarriage. The question is,[1] What price would a purchaser give for the annuity with the remarriage risk uninsured and probably uninsurable? The husband may also undertake to put the widow in the same position as if her right against the widows' fund had been to an annuity of such amount as, after deduction of tax at the standard rate from time to time, would leave the net amount actually receivable from the fund.

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[1] *Mackenzie* v. *Banks*, 1886, 24 S.L.R. 230; *Murray's Judicial Factor*, 1900, 8 S.L.T. 281; *Halkett* v. *Halkett's Judicial Factor*, 1890, 17 R. 719; *Douglas Gardiner & Mill* v. *Mackintosh's Trs.*, 1916 S.C. 125, per Lord Salvesen.

[2] *M'Callum* v. *M'Culloch's Trs.*, 1904, 7 F. 337.

[3] *Eliott's Trs.* v. *Eliott*, 1894, 21 R. 975; *Howat's Trs.* v. *Howat*, 1922 S.C. 506.

[4] *Bruce's Trs.* v. *Bruce's Tr.*, 1894, 21 R. 593.

[5] *Marshall's Factor* v. *Marshall*, 1897, 4 S.L.T. 282.

[6] See para. 1057, *infra.*

[7] *Higginbotham's Trs.* v. *Higginbotham*, 1886, 13 R. 1016.

(ii) *From Husband's Estate.*

1028. What has been said above [2] with regard to liferents to widows, to a considerable extent applies to annuities also. Alimentary protection requires a trust, and it appears that in the case of a secured annuity both the obligation and the security must be in favour of the trustees.[3] The rule is that, if income is insufficient, capital is liable; [4] but where the deed contains an annuity to the widow and capital provisions for the children, and creates security, *e.g.* by assignation of a life policy, it may result that only the income of the security fund can be applied to the annuity.[5] This raises the general question of ranking as between the provisions to widow and those to children, which ought to be specially considered and expressly ordered. It is important always to remember that an annuity given by antenuptial contract of marriage is a debt of the husband. If thereafter by will the husband gives to his widow a liferent of his whole estate, it ought to be expressly in lieu of the annuity, for otherwise there may be room for the contention that, in arriving at the yearly amount of the liferent, part of the year's annuity falls to be charged to capital,[6] but only if the husband has given a personal obligation for the marriage-contract annuity.[7]

(iii) *Annuities during Marriage.*

1029. The ordinary case is that the annuity is to come into existence only on the dissolution of the marriage, and only if the wife is the survivor of the spouses. Sometimes, however, the annuity is expressed to run from the date of the marriage. In that case it is reasonable to assume that the intention is that the annuity shall be applied towards household expenses, but if that be expressed as the purpose or as a condition, the annuity cannot stand against creditors.[1] In any case arrears are not good against creditors if no alimentary debts exist, the presumption being that the wife has been otherwise alimented.[2]

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[1] Finance Act, 1894, s. 7 (5).

[2] See para. 1024, *supra.*

[3] *Christie's Factor* v. *Hastie*, 1899, 1 F. 703.

[4] *Colquhoun's Trs.* v. *Colquhoun*, 1922 S.C. 32.

[5] *Hutcheson's Trs.* v. *Hutcheson*, 1886, 13 R. 915.

[6] *Landon* v. *Poysor*, [1910] 2 Ch. 444; apparently *contra* M'Laren on Wills, p. 579.

[7] *Buller* v. *Popham*, [1914] W.N. 257.

(iv) *Purchase of Annuity.*

1030. Trustees under an antenuptial contract of marriage have been held entitled to accept, after the husband's death, in satisfaction of his obligation in the contract for an annuity to his widow, a Government annuity on her life for the same amount, in the names of the trustees.[3] But authority was refused to a somewhat similar proposal made during the subsistence of the marriage.[4] In this latter case the prospective annuity was to the wife if she became the widow; it was not declared to be alimentary; there was a large trust fund which secured the trust annuity, and which it was proposed to pay out if the annuity was purchased; and there was the difficulty of the doctrine of the wife's matrimonial protection.[5] The grounds stated for refusal were that the trust fund was a better security than any purchased annuity, and that a purchased annuity would not be protected by the trust and could be sold by the wife. This case presents the curious position of it being found to be more difficult to deal with an annuity when it is non-alimentary than when it is alimentary. If the original annuity had been alimentary, the purchased annuity would necessarily have been declared so also, and the protection would have been perfected by the purchase being in the names of the trustees. If in the actual case the purchased annuity had been called alimentary, that would have been only a postnuptial arrangement, probably beyond the powers of the trustees. Even so, the wife would have been protected during the subsistence of the marriage on the doctrine of the matrimonial protection, but not when she became a widow. But, indeed, there was another objection, which must always apply to any such proposal made during marriage, namely, the legally possible acceleration of the annuity on divorce. And a tax-free annuity cannot at any time be provided by purchase. Practically that is so also when the annuity is restrictible, or is to lapse, on remarriage.

1031. Where the case is one which admits of being met by the purchase of an annuity, the position usually is that the person entitled to the corpus subject to the annuity desires to obtain payment of more of the capital than is possible if the trustees have to meet the annuity, or it may be that on that assumption he can obtain no payment of capital at all. But, on the other hand, the purchase of an annuity may result in a serious loss of capital if the annuitant dies soon. To meet these two considerations a middle course was devised and received judicial sanction in an unreported case,[1] where large sums were involved. The fiar obtained payment of the whole capital except the ascertained sum which, at the annuitants' then ages, would have purchased Government annuities; he gave the trustees his obligation for payment half-yearly of the annuities, whereupon he half-yearly was to receive the income of the retained fund; and, on default, he authorised the trustees to purchase annuities from Government in their own names.

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[1] *Eliott* v. *Purdom*, 1895, 22 R. (H.L.) 26.

[2] *Muirhead* v. *Miller*, 1877, 4 R. 1139.

[3] *Graham's Trs.* v. *Graham's Trs.*, 1898, 1 F. 357.

[4] *Ker's Trs.* v. *Ker*, 1895, 23 R. 317.

[5] See para. 1119, *infra*.

SUBSECTION (8).—*Death Duties.*

1032. Whether the widow's provision be liferent or annuity she will be liable for a proportion of estate duty if and so far as the provision consists of, or is charged on, or has to be paid out of, heritable estate. She may also be liable for legacy or succession duty. If this is explained to the parties, it may be desired that words of indemnity shall be inserted.

SUBSECTION (9).—*Income Tax and Surtax.*

1033. Reference is made to the article on Income Tax.[2] At the present high rates of taxation, it ought to be fully realised to what the burden on the general estate may amount before any clause of tax immunity is inserted. It will require to be considered what degree of relief is to be given. The extremest form of relief takes the shape of an additional annuity of such sum as, after deduction of income tax and surtax thereon, will reimburse to the widow all tax payable by her on her annuities, with the addition of words making clear that she is to be entitled to retain all refunds of tax.[3] It will be understood that the technical objection to any agreement of relief[4] applies to all these annuities, as they are contractual, but that difficulty can be avoided.[5] If, however, heritable security is being created for the annuity there is then the serious obstacle of the Scottish rule of precision in land rights.[6]

SUBSECTION (10).—*Security by Infeftment.*

1034. Certain special matters require consideration when it is proposed to secure the widow's provisions by infeftment. (1) If the infeftment is directly in her favour without the intervention of trustees, there cannot be effectual alimentary protection.[7] (2) In whatever way the infeftment be taken the rule of precision in land rights prevents a valid security being created for a tax-free annuity. (3) The same rule may[8] prevent the acceleration of the security in the event of the provision being accelerated on divorce at the wife's instance, and here again it matters not in what form the infeftment is taken, *e.g.* a locality right (now unknown), a bond of annuity, or a disposition in liferent, all expressed to be with entry on the death of the husband, in the event of the wife surviving him, and for all the days of her life after his death. It is matter of decision in *Dawes*[1] case that an entail annuity is not accelerated on divorce. But in fee simple cases, if the fee is vested in trustees with immediate entry on the marriage, upon trusts declared, including the wife's provision, this technicality is avoided. In any case any personal obligation will operate from the date of divorce, and the real security will stand good from the death of the husband if the wife should survive him.[1] When, under marriage contract, the wife is infeft in liferent without a trust, her consent to an alienation by her husband is effectual.[2] Even if there is a trust, the property being vested in the trustees, an alimentary beneficiary with a specific interest may validly consent when all that is proposed is that the trustees shall sell the property and invest the price within the trust as a *surrogatum.*[3] In the same circumstances the *curator bonis* to an incapacitated liferenter can obtain special power to consent.[4]

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[1] *Mackenzie's Trs.*, Lord Johnston (Ordinary), 1908.

[2] Vol. VIII. para. 262 *et seq.*

[3] *Le Fevre* v. *Pettit*, [1922] 2 Ch. 765.

[4] Income Tax Act, 1918, all schedules, Rule 23. The objection was not taken in *Wordie's Trs.* v. *Wordie*, 1922 S.C. 28.

[5] See INCOME TAX, Vol. VIII. para. 264, *ante.*

[6] See BOND, Vol. II. para. 755, *ante.*

[7] *Forbes' Trs.* v. *Tennant*, 1926 S.C. 294.

[8] *Somervell's Tr.* v. *Dawes*, 1903, 5 F. 1065.

SUBSECTION (11).—*Burden of Maintaining and Educating Children.*

1035. The deed sometimes bears that the widow's liferent or annuity is under burden of maintaining and educating the children, according to their station in life, till majority in the case of sons and till marriage in the case of daughters. There is reason to believe that such a clause sometimes gets in as matter of course and without the matter being positively considered. According to modern conceptions and expense of education, which may include professional education, the clause involves a heavy liability. On the other hand, it often operates to effect valuable relief in regard to income tax and surtax, the children being in effect regarded as beneficiaries of so much of the income as, after deduction of tax, leaves the net sum which represents the annual cost of maintenance and education.

SUBSECTION (12).—*Augmentation of Widow's Provisions.*

1036. The position under an antenuptial contract of marriage may be such that the husband is entitled to augment the provision thereby made by him for his widow at the expense of the children.[5] In *Lowden's* case[5] all that the husband had done in the marriage contract was to grant to trustees a general conveyance of his whole estate as at his death. The trusts were to pay his widow a capital sum of £150 in full of legal rights, and to pay the residue to the children of that marriage and a former marriage. By his will he gave his widow £300 more and a liferent of her children's shares of the residue under burden of alimenting them. These modifications being fair and reasonable in themselves were sustained as within the husband's power under such a form of marriage settlement.

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[1] *Somervell's Tr.* v. *Dawes*, 1903, 5 F. 1065.

[2] *Standard Property Investment Co.* v. *Cowe*, 1877, 4 R. 695.

[3] *Charlton's Trs.*, 1901, 9 S.L.T. 130.

[4] *Cowan's Curator bonis*, 1902, 5 F. 19.

[5] *Lowden's Trs.* v. *Lowden*, 1881, 8 R. 741.

SECTION 10.—PROVISION FOR THE HEIR.

SUBSECTION (1).—*Simple Destination.*

1037. If the husband is proprietor of a fee-simple estate, consideration will be given to the question whether, and to what effect, it is to be dealt with in the contract as regards its descent upon the heir (or the children or some one or more of them) of the marriage. In the books there are many references to simple destinations to the husband and the heir of the marriage, etc. Under a destination of this kind the right of the heir cannot be defeated gratuitously.[1] But the destination not only gives the heir no preference; it does not even enable him to compete with ordinary personal creditors. How bad his position may be is seen in *M'Leod*,[2] where he was found liable, up to the value of the estate, for a sum of £16,000, which the father had in the contract bound himself to provide to the younger children. There is this further to be kept in view, that if the husband's intention be to secure the estate to his heir at his death, that intention may, under such a form of settlement, be frustrated by daughters only being born of the marriage, and his only male issue being born of a subsequent marriage.

1038. Under a bare destination to the husband and the heir of the marriage, whom failing to other substitutes, the father is institute and fiar, and the heir of the marriage is only a substitute. The father may alienate or burden, but, in a question with the heir of the marriage, only for onerous causes, and he is under no obligation to reinvest the price.[3] In a question with other substitutes the father may dispone or burden gratuitously. Obviously his onerous creditors may affect the estate by diligence. But, without special clauses in the settlement, the father is not entitled to exclude the heir on account of insanity [4] or bankruptcy; [5] nor to restrict him to a liferent or annuity, even though the fee be given to his children; [6] nor to settle the estate in trust with the same beneficial destination.[7]

1039. Though the eldest son has no vested right during his father's life,[8] yet he may transact with his father and discharge his right of succession, even gratuitously, whereupon the whole destination is extinguished though he should predecease the father.[1] Or the father may anticipate the succession by disponing to the son, who may then, even gratuitously, disappoint the hopes of succession of all the other substitutes even though he should predecease the father.[2] It follows that father and son together can give a good title to a purchaser or donee, and then, whether the son survives or not, no other substitute can have any claim.[3]

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[1] *Livingstone* v. *Waddell's Trs.*, 1899, 1 F. 831.

[2] *Leslie* v. *M'Leod*, 1870, 8 M. (H.L.) 99.

[3] *Cunynghame* v. *Cunynghame*, 1804, Mor. 13029.

[4] *Stewart* v. *Stewart*, 2nd March 1815, F.C.

[5] *Spiers* v. *Dunlop*, 1778, Mor. 13026.

[6] *Ormistons* v. *Ormistons*, 1808, Hume 531.

[7] *Watson* v. *Pyot*, 1801, Mor. App. "Provision to Heirs and Children," No. 4.

[8] *M'Donald* v. *M'Donalds*, 1877, 4 R. 271.

SUBSECTION (2).—Jus crediti *to the Heir.*

1040. For practical purposes it appears that the only case in which the heir can have a *jus crediti*, but no preference, is where the father has in the contract bound himself to denude in favour of the heir, or of trustees for the heir, at some time which may arrive during the father's life, and either that time has not arrived, or at any rate the obligation has not been implemented. The intended denuding may be under reservation of the father's liferent, and subject to a liferent to the widow and provisions to younger children, or subject to reserved powers to create such rights, and to extensive powers of administration. But at any rate it contemplates denuding in form, and more or less in substance, at a date which may come in the father's lifetime, and for implement of that obligation, *tantum et tale*, the heir is a creditor, and his right may be protected by inhibition.[4]

SUBSECTION (3).—*Preference to the Heir.*

1041. The heir can have a preference only by denuding the father of the fee. There may or may not be a trust, and if there is, the father may be the sole trustee. The father may reserve his liferent either through a trust or without a trust. There need be no vesting in the heir unless and until he survives his father. The fee need not be provided for the heir alone. The beneficiaries may be all or any of the children of the marriage, and the father may have the fullest power of apportionment and selection, under which, as head of the house, he will be able to make what may afterwards appear to be the most fitting provision for the descent of the estate and the maintenance of the family.

1042. Care must be taken to secure the right of the fiar or fiars by immediate infeftment in the fee in appropriate terms. The point is, to divest the father of the absolute and beneficial fee vested in him on his prior title. If there be a conveyance to trustees for purposes declared, infeftment must be taken under the conveyance in favour of the trustees. If, again, there be a conveyance to the father in liferent for his liferent use only, and to the child or children of the marriage in fee, infeftment will be taken on a warrant "on behalf of A. B. (the father) for himself in liferent for his liferent use only, and for behoof of the heir (or children) of the marriage in fee."

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[1] *Routledge* v. *Carruthers*, 19th May 1812, F.C. But see Lord Watson in *Macdonald* v. *Hall*, 1893, 20 R. (H.L.) at p. 99.

[2] *Fotheringham* v. *Ogilvie*, 1797, Mor. 12991.

[3] *Haig* v. *Haig*, 1857, 19 D. 449 ; Bell's Prin., s. 1972.

[4] *Douglas* v. *Douglas*, 1724, Mor. 12910.

SECTION 11.—PROVISIONS FOR CHILDREN.

SUBSECTION (1).—*Beneficiaries.*

1043. In the case of entail provisions under the statutory powers the beneficiaries are those children only who survive the granter or are *in utero* at the granter's death, with an exception when the share of a predeceasing child has been settled in his or her contract of marriage with consent of the granter of the provisions. In the case of ordinary contractual provisions in favour of children these matters ought to be regulated by the contract of marriage. A serious question of vesting may be raised by indefinite language which may affect the *quantum* of the provisions.[1]

SUBSECTION (2).—*Quality of Provisions.*

1044. Children's provisions may be of any of four qualities; (1) they may confer no *jus crediti*, which means that the children cannot rank against creditors; or (2) they may confer a *jus crediti*; or (3) they may be entitled to a preference over the claims of creditors by virtue, and to the extent, of security created; or (4) they may affect funds or estate from which the general body of creditors already stands excluded.

(i) *No* Jus crediti.

1045. This is the position when the obligation is not enforceable during the granter's life. For example, an obligation to pay, on, or after the granter's death, or even to pay "before death, at such times and in such sums as he finds convenient."[2] This holds even though the granter is dead, and the term of payment has arrived, before the competition between the children and creditors arises.[3] It matters not that the obligation is to "provide and secure" the amount of the provision.[3] A provision of conquest gives no *jus crediti*,[4] and the same holds in all other forms of general conveyance which put the father under no restraint during his life.[5] But at the lowest the children have a right of protected succession, which cannot be disappointed by the granter's will.[6]

(ii) Jus crediti.

1046. The children hold *jura crediti* when the obligation is one under which principal or interest will, or may, become payable or transferable to the children or any trustee for them during the father's life; or if the obligation or destination is fenced with clauses restraining the granter's powers of dealing. For example, an obligation to pay within a stated time, say ten years after the marriage; or on demand of the trustees;[1] or on the dissolution of the marriage, for that may happen during the granter's life;[2] or on the eldest or youngest of the children attaining majority or being married, or on their respectively doing so;[3] or, even though the obligation is to pay on death, if it is coupled with an obligation to provide a stated value of securities when called upon by the trustees to do so;[1] or even if the obligation is contingent on the granter entering into a second marriage, and to pay only on death, if coupled with an obligation to ascertain the *quantum* at the time of the second marriage and to set it aside in a conscientious manner;[4] or if even interest only is payable during some part of the granter's life.[5] While in all these cases, because of or notwithstanding the conditions affecting the provision, there will be a right of ranking in the sequestration of the granter, the conditions which make the provision contingent, and the postponement of the date of payment, will affect the amount for which a ranking can be obtained.

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[1] *Walkinshaw's Trs.* v. *Walkinshaw*, 1872, 10 M. 763.

[2] *Mackinnon's Trs.* v. *Dunlop*, 1913 S.C. 222.

[3] *Goddard* v. *Stewart's Children*, 1844, 6 D. 1018; *Gillon's Trs.* v. *Gillon*, 1890, 17 R. 435.

[4] Ersk. iii. 8, 38, 39.

[5] See para. 1040, *supra*.

[6] *Gillon's Trs.* v. *Gillon*, *supra*.

(iii) *Preference.*

1047. The modes in which a preference may be acquired are (1) divestiture of the granter, as by the vesting of funds in the hands of trustees; or (2) security, heritable or otherwise, duly completed; or (3) diligence following on an obligation which confers a *jus crediti.*

(iv) *Preference without* Jus crediti.

(a) *Entail Powers.*

1048. Entail provisions to younger children are in a special position. The children are the only possible claimants; the provisions are payable only after the granter's death; there is no personal obligation, or at least there need be none; there is no infeftment in security of the provisions; yet if the granter's creditors proceed to force a disentail, it will be allowed only on condition of the children's provisions being charged on the estate.[6]

(b) *Other Powers.*

1049. Either spouse may possess powers of creating provisions for children, in principle more or less similar to entail powers. An estate may have been vested in the heir of a former marriage under a reserved faculty to create provisions up to a certain amount in favour of children of a future marriage; or there may have been a general conveyance by the wife to trustees in a former contract, subject to the like reserved faculty; and similar positions may arise in other ways. On the conveyancing side a good many questions may require consideration, and care is necessary.[1] But in the present connection, the point is that creditors already stand excluded, or, if the power arises by grant and not by reservation, creditors never had a *locus*; and beneficiaries under an exercise of the power have a preference independently of any personal liability or *jus crediti.*

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[1] *Black* v. *Black's Trs.*, 1912, 2 S.L.T. 68.

[2] *Goddard* v. *Stewart's Children*, 1844, 6 D. 1018.

[3] *Cruickshank's Trs.* v. *Cruickshank*, 1853, 16 D. 7.

[4] *Greenock* v. *Greenock*, 1870, 8 M. 386.

[5] *Mackinnon's Trs.* v. *Dunlop*, 1913 S.C. 232.

[6] Entail Amendment Act, 1848, s. 6.

(c) *The Rule in the Clanranald case.*[2]

1050. This rule is that, though the provision for children, according to its own nature, is such that the children could not compete with the creditors of the granter in a process of distribution of his general estate, nevertheless if security be granted for the provision, that security shall stand good upon the asset on which it is charged. In the *Clanranald* case the security was constituted at the same time as the granting of the provision and in the same contract of marriage; but the same principle holds though the security is created as a separate matter and at a later date, assuming that no question of solvency as at that date arises.[3]

SECTION 12.—SETTLEMENT OF LIFE POLICY.

1051. When the husband assigns a policy of assurance on his life the deed ought to contain an obligation by him to pay the premiums, and any benefits passing to him under the deed should be charged with due fulfilment of that obligation. Powers ought to be conferred on the trustees to surrender bonuses, and to borrow on the policy for payment of premiums; also to convert it into a paid-up policy.

SECTION 13.—USUAL PURPOSES OF THE HUSBAND'S TRUST.

1052. When the husband vests assets in trust the purposes will probably be: (1) For his liferent so far as the assets yield income in his life, subject to due fulfilment of all obligations undertaken by him in the deed so far as these have accrued due. This liferent cannot be made alimentary unless the settlement is made not really or solely by himself but by and on direction of a third party, which may be proved by evidence outside the deed.[4] If thought fit a declaration may be inserted that in the event of a case arising in which the income or any part of it would be payable to any person other than the husband personally, his right shall cease or be suspended and the income shall be paid to or applied for the benefit of the wife or children or wife and children as the trustees think proper. (2) For the alimentary liferent of the widow with such, if any, provision regarding the case of remarriage as may be thought fit. It may be necessary to make it clear how this liferent is to stand in relation to any annuity in favour of the wife undertaken by the husband; the liferent may be only on account of the annuity, and in part security of it; on the other hand, the wife may be intended to take a larger interest in the husband's trust fund in security of the annuity.[1] (3) For the children or remoter issue in fee, with provisions regarding (*a*) vesting, (*b*) payment, (*c*) powers of appointment, (*d*) advances of capital or income with further provisions regarding interest or no interest; and as to bringing the advances into account or not, as may seem appropriate and in accordance with the views of the spouses. The *conditio si sine liberis* applies to provisions in a marriage contract.[2] Finally (4) a resulting trust for the husband,[3] but subject to due fulfilment of all obligations by him in the deed.

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[1] Stair, ii. 3, 54, note by Brodie; Ersk. ii. 3, 50; Bell, Com. i. 39 *et seq.*; Prin., s. 924 *et seq.*

[2] *Herries, Farquhar & Co.* v. *Brown*, 1838, 16 S. 948.

[3] *Falconer* v. *M'Arthur*, 1825, 3 S. 317; *Young* v. *Watson*, 1835, 14 S. 85.

[4] *Corbet* v. *Waddell*, 1879, 7 R. 200.

Section 14.—Excess Security.

1053. It is suggested that there is some flaw in the draughtsmanship when there is produced a situation in which trustees are entitled and bound to retain under trust management funds to an amount larger, and it may be much larger, than is required for any matrimonial purpose. Examples are *Montgomery*,[4] where (irrespective of a partial alimentary liferent) £18,500 was tied up to secure £12,000 to children; and *Henderson*,[5] where the husband's share of his father's estate having been assigned to trustees to secure £3000 for the children on his death, the husband was not allowed to obtain the surplus of his succession from his father's estate, after providing the £3000 in the hands of his own marriage trustees. After all, marriage contracts are family settlements, not mortgage transactions, and consideration may seem to support the introduction of clauses to enable such results to be obviated. These results cannot be in the best interests of the family, for these rigid trust restrictions will not conserve the assets, which can always in effect be reached through the expensive medium of *post obit* or other reversionary transactions.[6]

Section 15.—Settlement of Wife's Estate.

Subsection (1).—*Wife's Radical Right.*

1054. Because it has been a common form in practice it is here assumed that the provisions by the wife are based on a general conveyance by her to trustees of her estate present and future, *acquisita et*

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[1] See para. 1028, *supra*.

[2] *Hughes* v. *Edwardes*, 1892, 19 R. (H.L.) 33; *Macdonald* v. *Hall*, 1893, 20 R. (H.L.) 88, per Lord Watson at p. 98.

[3] See para. 1076, *infra*.

[4] *Montgomery's Trs.* v. *Montgomery*, 1888, 15 R. 369.

[5] *Henderson's Trs.* v. *Henderson*, 1900, 3 F. 17.

[6] With the cases mentioned in this paragraph contrast *Ramsay*, stated in para. 991, *supra*.

acquirenda. And at the outset it is proper to note the wife's continuous subsisting radical right. This aspect is dealt with below,[1] with special reference to failure of the proper matrimonial purposes under general conveyances; but the doctrine of radical right or undivested ownership is recognised in other aspects. The principle was enunciated by Lord President Inglis in the following terms.[2] "Such a conveyance does not divest the lady of what she has or of what she is to succeed to, unless the money so conveyed is directed to be applied by the trustees to marriage-contract purposes, and she is divested only in so far as it is directed so to be applied. In so far as it is not directed to be so applied, she remains absolute owner, the conveyance being only a burden on her right." That was said in a case where the trust purposes of the wife's estate were to pay half of the income to the husband if he survived the wife, and to hold for the children in fee. The decision was that so far as these purposes did not dispose of the income, it had not been settled, and the wife's right to it remained intact.

SUBSECTION (2).—*Operation of General Conveyance.*

(i) *General Scope.*

1055. The modern form of general conveyance operates quite differently from the older forms earlier referred to.[3] The trustees are intended, and are bound, to enter into immediate possession of the wife's present estate unless subject to existing liferent rights, and also to ingather her future estate as it arises and on their obtaining information of its existence. But as to both *acquisita* and *acquirenda* there are qualifications upon the generality of the settlement. In the case of *acquisita* there are exceptions by reason of the quality of the assets, these exceptions arising partly by implication of law and partly by convention of parties; and in the case of *acquirenda* there are those exceptions and also the restriction of an implied time limit. *Acquirenda* are sometimes conveyed without any express time limit[4] or with a time limit of the lady's death,[5] or the dissolution of the marriage. But in all these cases the effect of the conveyance is limited to what vests in her during the subsistence of the marriage.[6] The test is vesting, not payment, and the rule is the same in a postnuptial contract.[7] A right vested subject to defeasance passes, though the certainty that defeasance is not to operate does not appear till after the dissolution of the marriage.[8]

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[1] See para. 1077, *infra.*

[2] *Higginbotham's Trs.* v. *Higginbotham*, 1886, 13 R. 1016. Cf. *Montgomery's Trs.* v. *Montgomery*, 1895, 22 R. 824.

[3] See para. 1012 *et seq.*, *supra.*

[4] *Wardlaw* v. *Wardlaw's Trs.*, 1879, 7 R. 1066.

[5] *Russell's Trs.*, 1887, 14 R. 849.

[6] *Boyd's Trs.* v. *Boyd*, 1905, 7 F. 576 ; *Morier* v. *Gilmour*, 1890, 27 S.L.R. 751.

[7] *Aytoun* v. *Moir*, 17th February 1814, F.C.

[8] *Grant's Trs.* v. *Ritchie's Exrs.*, 1886, 13 R. 646.

(ii) *Powers.*

1056. It is doubtful whether property over which the settlor has a power of appointment (even general and *inter vivos*) will pass unless specially apt words be used.[1] The beneficial purposes in the marriage contract may be *ultra vires* of the power. In *Montgomerie* it was held that a general conveyance by the wife in the usual terms did not exercise a general but *mortis causa* power of disposal conferred on her in her mother's will which came into operation during the subsistence of the marriage, and this notwithstanding that there was annexed to the general conveyance in the marriage contract a special assignation of the provisions made or to be made in favour of the wife by her mother.

(iii) *Capital Only carried.*

1057. The conveyance, if in common terms, is in legal effect limited to capital sums, and does not include liferents or annuities.[2] The rule is apparently the same when the general conveyance is to the husband.[3] Though the wife should by realisation or otherwise come into possession of a capital sum as a *surrogatum* for the life interest (as a tercer on the sale of the property), that lump sum will still be hers unaffected by the trust,[4] and if in fact for administrative purposes the life interest have been vested in trustees upon trust to let the wife have the full benefit of it, they will be bound to supply and exhaust the surrogated lump sum for her benefit instead of paying her only the interest of it.[5]

(iv) *Paraphernalia.*

1058. It may be prudent to insert an express exception of paraphernal goods present and future.[6] Difficulty may arise if the settlor succeeds to, say, valuable jewellery, not by specific bequest, but as a part of a residue or of an intestate estate.[7]

(v) *Limit of Amount.*

1059. It is very common to except sums under (or not exceeding—which may be an important difference) a specified amount, say £100, to which the wife may become entitled or "which may become payable to her," and sometimes there are added such words as "from one source and at one time." The object is to enable the wife to receive for her personal use, free from the trust, small gifts or legacies which may fairly be supposed to have been so intended. The whole subject has been exhaustively discussed and adjudicated upon in England.[1] Death duty is deducted in applying the fixed limit.[2]

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[1] *Tremayne* v. *Rashleigh*, [1908] 1 Ch. 681; *Montgomerie's Trs.* v. *Alexander's Trs.*, 1911 S.C. 856.

[2] *Neilson's Trs.* v. *Henderson*, 1897, 24 R. 1135; *Culcreuch's Trs.* v. *Home*, 1894, 2 S.L.T. 170; *Boyd's Trs.* v. *Boyd*, 1877, 4 R. 1082; *Young's Trs.*, 1885, 12 R. 968; *Hunter* v. *More's Trs.*, 1896, 4 S.L.T. 28; *Murdoch's Trs.* v. *Stock*, 1923 S.C. 906.

[3] *Ramsay's Trs.* v. *Ramsay*, 1899, 1 F. 495.

[4] *Churchill* v. *Denny*, 1875, L.R. 20 Eq. 534.

[5] *Bonner's Trs.* v. *Bonner*, 1898, 6 S.L.T. 32.

[6] *Willoughby* v. *Middleton*, 1862, 2 J. & H. 344, 70 E.R. reprint 1089.

[7] *Dickson* v. *Dickson*, 1890 W.N. 10; *Alexander's Trs.* v. *Alexander*, 1894, 2 S.L.T. 172.

(vi) *Successions excluding the Marriage Contract.*

1060. The immediately preceding case leads up to the matter of larger legacies or successions falling to the wife which it is not intended should pass under the trust. No matter how express the testator's directions may be, the wife's general conveyance must receive effect and the marriage trustees will be bound to claim the money.[3] In most cases, no doubt, this is much the better course for the wife; but if it be wished to leave it possible for successions and bequests to be taken and retained by the wife personally without regard to amount if the testator shall have expressed an intention to that effect, that purpose will be achieved by excepting from the wife's general conveyance all property to which she may acquire right under testamentary or other instruments provided the testator or granter has expressly declared an intention that the same shall not fall under the marriage trust. That is the only general mode of achieving the purpose *a priori*. But there is an alternative method. Thus A. under marriage contract assigned to trustees *acquirenda* which "shall at one time amount to or be equal in value to £100"; thereafter her sister made a will by which she directed her trustees to pay to A. one-half of her estate "in sums not exceeding £95 at any one time at intervals of one month," there was a declaration that the purpose was to prevent the money falling under the marriage trust, and the vesting of each monthly instalment was made dependent on A. surviving the respective terms of payment. It was held that the one-half (about £500) of the sister's estate did not go to the marriage trustees.[4] When the wife has an interest in a fund subject to a power of appointment in X., it may be possible to exclude the marriage trust by successive appointments by X. to the wife—each under the excepted minimum in terms of the marriage contract.

(vii) *Foreign Land.*

1061. Peculiarities of foreign law may lead to unexpected results. Thus by the law of Jersey trusts of this character are not recognised, and all transfers of real estate must be for adequate pecuniary consideration. In England it has been held that land in Jersey must accordingly escape.[5]

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[1] Wurtzberg's Covenants for Settlement, p. 72.

[2] *Scott Chad* v. *Pares*, [1901] 1 Ch. 708.

[3] *Douglas's Trs.* v. *Kay's Trs.*, 1879, 7 R. 295; *Pullar's Trs.* v. *Pullar*, 1879, 16 S.L.R. 806; *Simson's Trs.* v. *Brown*, 1890, 17 R. 581.

[4] *Campbell* v. *Campbell's Trs.*, 1899, 1 F. 999.

[5] *Pearse* v. *Pearse*, [1909] 1 Ch. 304. Cf. *Brown's Trs.* v. *Gregson*, 1920 S.C. (H.L.) 87.

(viii) *Provisions by Husband for Wife.*

1062. It is common to except the provisions in favour of the wife made by the husband in the marriage contract. If, as is probably the case, those provisions do not arise until after the dissolution of the marriage, they could not in any case fall under the settlement by the wife, that being limited to *acquirenda* during the subsistence of the marriage. Besides, the main provision will probably be an annuity, and if it be expressly excepted, that fact at least gives support to an argument that other annuities and liferents, if any, are included, which is not the law, and is no doubt not intended.

(ix) *Wife's Legitim.*

1063. The general conveyance may (but practically it never does) expressly include the wife's right to legitim or her right to elect between legitim and testamentary provisions in her favour in her parents' wills. In the absence of such a special assignation the wife is entitled to elect to accept testamentary provisions instead of legitim, though that may exclude the marriage trustees. The right of election is not impliedly included in the general conveyance, but probably an express assignation of it would be valid.[1]

(x) *Savings.*

1064. As to the relation of a general conveyance of *acquirenda* to property acquired by the wife in the form of investment of savings from her income, see the cases noted, in which it was recognised that those savings, and the investments representing them, do not fall under the settlement, but that the onus of proving the origin of the property is on the wife.[2] In *Young's* case the proof failed. This emphasises the importance of preserving evidence of the source of the property. The same law applies to all reinvestments and increments of the property, and also to all profits in that or any other way which the wife may make by dealing with other excepted property, *e.g.* limited legacies or successions which by the terms of the settlement are not to pass to the trustees; and here again it is necessary to record the history of the funds.

(xi) *Presents from Husband.*

1065. A conveyance of *acquirenda* by wife to husband does not prevent him making a present to her, which will receive effect in favour of herself and her representatives notwithstanding the general conveyance.[3]

(xii) *Time Limit resulting from Divorce.*

1066. For the purpose of measuring the operation of a general conveyance, dissolution of marriage by divorce is the same as by death.[4]

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[1] *Mackenzie's Trs.* v. *Beveridge's Trs.*, 1908 S.C. 1185.

[2] *Young's Trs.* v. *Young's Trs.*, 1892, R. 22; *Dunbar Dunbar's Trs.* v. *Dunbar Dunbar*, 1905, 7 F. (H.L.) 92; *Bertram's Trs.* v. *Matheson's Trs.*, 1888, 15 R. 572.

[3] *Thomson's Trs.* v. *Thomson*, 1879, 6 R. 1227.

[4] *Eadie's Trs.* v. *Henderson*, 1919, 1 S.L.T. 253.

If, after divorce at the wife's instance, she predeceases the husband, income of the settled fund between the two deaths (originally intended for him) does not fall under the settlement, but is free executry estate of the wife.[1]

(xiii) Spes successionis.

1067. It is laid down that a general conveyance of *acquisita et acquirenda* in ordinary terms does not carry a *spes successionis* or contingent interest though arising under an irrevocable instrument such as another marriage contract or the will of a deceased testator.[2] In order to exhaust the subject it is necessary to consider the case where the contingent interest is expressly included and the case where it is not; and express inclusion covers not only the terms of the clause of conveyance but also an indefinite or unqualified conveyance plus express indications from the terms of the trust purpose or the directions to the trustees. It is right, however, to point out that such an express special assignation of a *spes successionis* is not strictly part of the subject of general conveyances. The case may be figured where a *spes successionis* is all that the lady assigns to the marriage trustees. In that case it is difficult to see why the assignation should not take effect if the right vests in her at any time in her life, though after the dissolution of the marriage, whether by divorce or by the death of the husband. The case is not so clear where the inclusion of the *spes* rests upon an addition to, or expansion of, the ordinary general conveyance, *e.g.* a conveyance of all estate which shall belong to the wife during the subsistence of the marriage (this time limit being either express or implied), expressly including a specified *spes*. In such a case it is difficult to see why the property to which the *spes* relates should pass under the settlement unless it becomes absolute within the time limit which applies to the subjects of the general conveyance proper. Finally, if the question of the inclusion in the settlement of the benefit of the *spes* rests only on the general conveyance, without an addition or expansion, the position is (1) if the right never vests in the wife, nothing can be carried; (2) if it vests in her during the subsistence of the marriage it is carried, and no specialty arises; (3) if it vests in her after the marriage has been dissolved by the husband's death or by divorce, it is not carried.[3]

(xiv) *Life Policies.*

1068. Naturally many questions have arisen regarding the relation of general conveyances to policies of life assurance. There is the special consideration that the policies are kept up by payment of premiums which are usually provided out of income, and that a general conveyance is impliedly limited to capital sums and does not include savings nor the investments of savings. A general conveyance by the wife does not include the proceeds of a policy effected by the husband on his own life, payable at his death to the wife if then surviving; the widow gets the money absolutely and free from the trust.[1] The reason is that her general conveyance operates in law only during the subsistence of the marriage, whereas the policy moneys vest in her only on the dissolution of the marriage. An endowment policy payable on the husband attaining a certain age or on his death if earlier, and then payable to the wife if surviving at either date of payment, would be in the same position as the policy in *Coulson*,[1] if the money became payable on the husband's death, but otherwise if it became payable by his surviving the specified age. But a wife's general conveyance to her husband does not cover a policy effected by him on her life, in favour of her, and her heirs, executors, or assignees, though without any condition that she shall survive him.[2]

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[1] *Gavin's Trs.* v. *Walker's Trs.*, 1907, 15 S.L.T. 681.

[2] *Wyllie's Trs.* v. *Boyd*, 1891, 18 R. 1121.

[3] *M'Given's Trs.* v. *Macdonald*, 1909 S.C. 57.

1069. If both spouses grant general conveyances, including *acquirenda*, to trustees for the survivor in liferent and the children in fee, and in the same marriage contract the husband binds himself to insure his life and to assign the policy to his wife, and this is carried out, the policy will not pass under the trust if the wife should be the survivor.[3] In such a case it happened that the husband did not assign the policy to the wife, but took it out in the names of the marriage trustees, who on the death of the husband uplifted the policy moneys and administered the fund for fifty years. Even under these circumstances it was held that the fund did not fall under the trust but was the separate property of the widow.[3] Apparently the result might have been the same even if the wife had predeceased her husband, on the view that the policy was intended to be the wife's property independently of the other facts of the contract of marriage, and therefore unaffected by her general conveyance; unless, indeed, it had been construed as a provision contingent on survivance.[4]

1070. In the following cases the proceeds of life policies were kept out of the operation of general conveyances by reason of the sources from which the premiums had been paid: (1) A policy effected by a husband on his wife's life was held to be assignable by him to a stranger gratuitously notwithstanding a general conveyance by him in his contract of marriage, because he had an income not falling under the settlement, sufficient to provide the premiums.[5] (2) A policy effected by a wife on her own life in her own favour was held not to fall under a general conveyance by her in favour of her husband in their contract of marriage, because she had paid the premiums out of her own income, which did not fall under the general conveyance.[6] The policy had been effected to enable the husband to borrow money, and on the wife's death he was held bound to free the policy of the loan.

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[1] *Coulson's Trs.* v. *Coulson*, 1901, 3 F. 1041.

[2] *Thomson's Trs.* v. *Thomson*, 1879, 6 R. 1227.

[3] *Constable* v. *Mackenzie*, 1911, 1 S.L.T. 411.

[4] See para. 1111, *infra*.

[5] *Champion* v. *Duncan*, 1867, 6 M. 17.

[6] *Ramsay's Trs.* v. *Ramsay*, 1899, 1 F. 495.

SUBSECTION (3).—*Trustees' Duties under General Conveyances.*

1071. A serious question may be raised as to the duties of the trustees and their responsibility if they fail to ingather the estate belonging to the wife at marriage or as it comes to her after marriage, or at least to intimate their title where the estate is not immediately transferable. It is not known that there is any Scots authority. The trustees are not detectives, but they ought to make inquiry of the spouses in writing and obtain a written reply, and where further inquiry fairly suggests itself it ought to be made. A special immunity clause is recommended. Several cases have occurred where questions have arisen as to whether intimation has been made,[1] and whether competing parties were personally barred from pleading that the assignation in favour of the marriage-contract trustees had not been intimated.[2] On the other hand, parties dealing with a married woman or a widow have no duty to inquire whether she has signed a marriage contract; nor even if they know she has done so, are they thereby charged with knowledge that it contains a general conveyance by her.[3]

SECTION 16.—RIDERS UPON THE GENERAL CONVEYANCE.

SUBSECTION (1).—*Generally.*

1072. The preceding paragraphs deal with exceptions *ab initio* from what may nevertheless still be called a general conveyance, whether these exceptions be by rule of law or by paction. The subject of general conveyance being thus ascertained, there may be various riders upon its operation, and these also may be implied or express. The settlement in trust of one's whole estate, present and future, is a serious conception, and as Lord Shand observed in *Mackie's* case [4] it is matter of surprise that it seems to be granted, or to have been granted, in the very recent past, without profoundly pondering the extent and effect of the commitment; if indeed it was properly explained to, or realised by, the settlor. It is surely a very serious step for anyone to place himself or herself in the position of being unable to leave a legacy of even £100 to a favourite charity, and that is what it may amount to. It is equally seriously here suggested that there should be a reserved power to the granter to deal, by will revocable at pleasure, with a small specified proportion of the capital as at death, not exceeding a stated amount.

SUBSECTION (2).—*Important Family Purposes.*

1073. In the case of *Higginbotham*,[5] Lord President Inglis wisely said that the principal objective of parties to a marriage contract is, how they are going to live, and the "how" includes "where," or the matter of a residence. The preparation of a contract of marriage is one occasion where a family solicitor has the privilege and the responsibility of placing, not merely his professional skill, but also his experience of life and his ripened judgment at the service of his client for the benefit of both parties. A strict unyielding settlement of a young wife's whole fortune may in certain circumstances prove penny wise and pound foolish. The fund may indeed be so moderate that nothing can be risked. On the other hand, it may be so large that such purposes as are in view in this paragraph can more or less easily, by the aid of educative economy and management, be met out of income. But there are many cases between those extremes. The husband's professional or business advancement is the common interest of the spouses. Reason suggests and experience confirms that the provision of money for such purposes as to purchase a medical practice, or to procure a partnership in a commercial house, may be the wisest use to which part of the wife's money can be put. The same thing may apply to the matter of a residence, which indeed, as in the case of a medical man, may be of the essence of the goodwill. The contract may direct or authorise that the accommodation shall or may be given, on the request of the wife, by payment out to her, or by a loan to the husband, of the whole amount or a proportion, including, in the case of a house, alterations, additions, improvements, and fittings; or the trustees may be authorised to purchase a house and to expend money on it, the house to become an asset of the estate.[1]

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[1] *Tod's Trs.* v. *Wilson*, 1869, 7 M. 1100; *Miller* v. *Learmonth*, 1870, 42 Sc. Jur. (H.L.) 418; *Gams* v. *Russel's Trs.*, 1899, 7 S.L.T. 289; *Campbell's Trs.* v. *Whyte*, 1884, 11 R. 1078.

[2] *Graeme's Tr.* v. *Giersberg*, 1888, 15 R. 691; *Dunn's Trs.*, 1896, 4 S.L.T. 46.

[3] *Campbell's Trs.* v. *Whyte*, *supra*.

[4] *Mackie* v. *Gloag's Trs.*, 1884, 11 R. (H.L.) 100.

[5] *Higginbotham's Trs.* v. *Higginbotham*, 1886, 13 R. 1016.

SUBSECTION (3).—*Reservation of Power to provide for a Subsequent Marriage.*

1074. This matter is treated below in discussing the subject of second and subsequent marriages.[2]

SECTION 17.—USUAL PURPOSES OF THE WIFE'S TRUST.

1075. Reference is made to the discussion above of the purposes of the husband's trust.[3] The order of the liferents will be reversed and the principal difference is that an alimentary clause regarding the wife's liferent of her own money is effectual during the subsistence of the marriage, and possibly longer if there are young children to be supported.[4] The husband's liferent may be charged in like manner as suggested above with regard to the wife's liferent.[5]

SECTION 18.—THE ULTIMATE TRUST PURPOSE OF THE WIFE'S ESTATE.

SUBSECTION (1).—*Resulting Trust.*

1076. There is, in modern case law[6] and otherwise, evidence that often too little attention is given to the framing of the trust purpose in marriage contracts applicable to the event of the failure of the proper matrimonial trusts. The cases shew that it is not safe to rely upon anything except express and clear language in the deed, and that express language has not always been clear. Thus *Anderson* was a judgment of the whole Court, with four dissents, and overruling a prior First Division decision. The matter is here dealt with on the assumption that it arises regarding the funds brought into settlement by the wife under a general conveyance in the contract of marriage.

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[1] Cf. *Ross* v. *Ross's Trs.*, 1918, 1 S.L.T. 222.

[2] See para. 1104 *et seq.*, *infra.*

[3] See para. 1052, *supra.*

[4] See para. 1024, *supra.*

[5] See para. 1034, *supra.*

[6] *Anderson's Trs.* v. *Forrest*, 1917 S.C. 321; *Battye's Trs.* v. *Battye*, 1917 S.C. 385.

1077. The failure of the matrimonial purposes means that the husband's liferent, if any, is out of the field by his predecease, or by his survival and death, or (if so conditioned) remarriage, or by divorce at the wife's instance, and that the provision of the fee to the issue has failed, either by no child having been born or by issue having all failed to attain vested interests under the terms of the preceding trust purposes. It is elementary that, subject to those purposes, the funds settled by the wife remain her property. Expressing it otherwise, the estate reverts to her under a resulting trust springing from her radical right. That is irrespective of whether she is the survivor of the spouses or is not. Indeed, even if she be the survivor, and though the matrimonial purposes fail, it may not be possible for the funds to be made over to her during her lifetime, for minor issue may survive her, and the failure of the matrimonial purposes may be ascertained only on the death of the issue after her, without attaining vested interests. But, however the events may happen in order of time, if the matrimonial trusts affecting the *corpus* fail, then the estate must of necessity revert to the wife, though she may be dead, and though she could not have known of it, and though the reverting fee may be burdened with the liferent of the surviving husband.

SUBSECTION (2).—*Express Clause.*

1078. Where the law of resulting trust is so certainly applicable, it may be asked what is the use of any express trust purpose. The sufficient answer is that it will be found that the application of the doctrine of bare resulting trust to such cases may frustrate the whole intention of the lady and transfer her fortune from her own family to that of her husband. These ultimate clauses operate only subject to the proper matrimonial purposes, and what follows on the subject is on the assumptions that the issue's provisions fail, and that the husband's liferent fails or is satisfied. In whatever terms the ultimate purpose is expressed, the wife's settled estate is thus hers, and her radical right does not depend on that clause. Accordingly if she survive the failure of the matrimonial purposes, the estate must be paid to her. The estate is necessarily at her disposal *inter vivos* by sale, security, gift, or otherwise, and it may be attached by her creditors. So far as the estate is not so disposed of by the wife, she has full testamentary power over it. Finally, in the absence of a contractual element,[1] the parties favoured by the ultimate purpose take only failing the wife having otherwise disposed of the estate, *inter vivos* or *mortis causa.* The seven following paragraphs deal with various forms of the ultimate trust purpose.

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[1] See para. 1002, *supra*.

1079. There may be inserted an express bare resulting trust for the wife, as by a direction to the trustees to hold the estate, if and so far as the preceding purposes shall fail, "for the wife absolutely." Exactly the same results would be produced by inserting no ultimate purpose at all. If the wife has predeceased the period of payment, she may have been survived by her husband only, or by issue only, or by both. If by her husband only, his liferent (assuming it to exist) is the only fetter on her radical and reversionary right, which is thus absolute and indefeasible; if by issue only, her right is subject to defeasance if they or any of them attain vested rights, and it will become absolute only if and when they all die without doing so; if she is survived by both husband and issue, her right is subject to both these riders. Assuming that the issue die before the expiry of the husband's liferent, or, if surviving, fail to attain vested rights, how is the fund to be divided? It will, under the trust figured above, go as the wife's estate, heritable or moveable as the case may be, excluding the *jus relicti* and courtesy (because *ex hypothesi* discharged) but invoking the law of succession of the wife's domicile at the date of her death as regards what is personal estate, and the law of the *locus* as regards all heritable or real property.

1080. The objections to a clause in this form are (1) the wife's domicile may be changed by her marriage, or at any rate after marriage, without her consent and against her will, but nevertheless her succession will follow it. (2) Even if her domicile remains Scottish, her issue surviving her take vested rights at her death no matter how soon after her they may die, though they fail to attain vested interests under the matrimonial purposes; and though the contract of marriage in terms declares that they shall take nothing unless they attain majority or marry and survive the expiry of the liferents, both of which they fail to do. (3) If infant children thus take in apparent defiance of the deed, then on their subsequent death, the fund or part of it passes to their father, if surviving, or if dead then to his relatives, and thus it is lost to the family of the wife from which it came. The best example of this is when the wife dies in childbirth, and the only child dies immediately after, whereupon the whole estate is lifted from the one family and given to the other. The extreme is seen when one considers that divorce at the wife's instance would not affect this, so that it might happen that the forfeiture by the husband of an alimentary liferent by reason of the divorce merely gave him an unfettered, instead of a fettered, fee. (4) Assuming no children but a long survivance by the husband (in *Anderson*[1] it was thirty-three years and in *Battye*[2] fifty-two), there is the probability of many devolutions of the beneficial interests among the wife's relatives, with correspondingly accumulated claims for death duties.

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[1] *Anderson's Trs.* v. *Forrest,* 1917 S.C. 321.

[2] *Battye's Trs.* v. *Battye,* 1917 S.C. 385.

1081. Another suggestion is that the ultimate trust of the wife's estate may be expressed to be "for such person or persons as would have become entitled [to her personal estate] if she had died intestate and unmarried." This form is much favoured in some of the style books. The intention is to vest the succession at the wife's death, but to exclude (by the words "if she had died unmarried") the husband and the issue of the marriage. The idea is that, apart from any future will to be made by the wife, the husband and issue should take only what is given to them in the matrimonial purposes; and to secure that, failing those purposes, the wife's property shall revert to her own side of the house.[1]

1082. This form is unsuited, at least without material adjustment, to the case of the settlor being a widow with children of her first marriage. But apart from that, the objections are (1) it appears to be not a substantive destination, but an invocation of intestacy with exclusions, and therefore subject to the law of the wife's domicile at death. If that be so, it would in *Battye* [2] have let in the English law of intestate succession, excluding issue and the husband and his relatives. It is, however, easy to keep to the Scots law of succession by introducing the words "domiciled in Scotland" after "died." (2) If this trust purpose comes into operation, as the succession must be traced on the basis of vesting at the wife's death, though payable perhaps at a long interval after, there is the possibility of many devolutions of the beneficial interests with accumulated death duties. (3) Such an ultimate trust has the further disadvantage that under it there may come about the very result which is intended to be prevented, namely, the passing of the estate from the one side of the house to the other, even though issue have failed to take a vested interest under the matrimonial purposes. Assume that the wife is survived by the husband, one infant son, and an only brother; the brother dies, and then the child dies still in infancy. Thus the matrimonial purposes have failed, and accordingly *ex post facto* it is ascertained that there was vesting in the brother at the wife's death. On his death intestate the estate passed to his nephew, the minor, and on the latter's death to the father or his relatives. (4) There is the undesirable, if not absurd, result of the fund having vested in a person or even in successive persons, who were ignorant of it. Thus if the wife is survived by several children and by a brother, the latter may die soon after her, but the children may live for years after that, and yet may all fail to attain vested interests under the matrimonial purposes even though they attain majority. It may be anomalous that a son should take the fund without fulfilling the conditions of the deed, but it may be thought to be even worse to pass over a living major son in favour of a dead brother.

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[1] *Boyce* v. *Wasbrough*, [1922] 1 A.C. 425.

[2] *Battye's Trs.* v. *Battye*, 1917 S.C. 385.

1083. It may be directed that the fund shall not vest till the date of payment. Where that is so, issue, if any, must have died before vesting can take place under the ultimate purpose, but the husband may be in life if his liferent has terminated by remarriage. The wife's heirs might fall to be ascertained according to a law other than the law of Scotland, either because of a change of domicile or because of English or other foreign law applying to real estate. On the other hand, there can be no devolutions in the succession, and therefore no accumulated death duties. When this form finds favour the final trust purpose may run to the effect that, subject to the preceding purposes, the trustees shall hold the estate and all accumulations, if any, "for the wife and her assignees *inter vivos* or *mortis causa*, and failing them then for her heirs *in mobilibus*" (or as may be preferred) "to be ascertained at the time of payment, all according and subject to the law of Scotland."

1084. This method or form is open to the objection that vesting may be suspended for a long time without any apparently sufficient reason, and contrary to what would probably have been the intention if the case had been foreseen. Thus if there be assumed such facts as occurred in *Anderson's* case;[1] the wife died in 1882, the only child in 1883, and the husband in 1915. Under an ultimate trust such as is now under consideration, while 1915 would be the date of payment, it was clear for thirty-two years that the matrimonial purposes had failed as regards the *corpus*. The mere existence of the burden of a liferent in favour of the husband seems scarcely a sufficient reason for suspending vesting in the blood relations of the wife for over thirty years as in *Anderson*,[1] or for over fifty years as in *Battye*.[2]

1085. Another suggested form or method is to give the fund to the wife's heirs to be ascertained at the time when it appears that issue are not to take vested rights under the matrimonial purposes. Where this is prescribed there can be no possibility of issue taking under the ultimate trust in defiance of their own restrictive matrimonial clause. The husband may or may not be surviving. An ultimate trust will proceed on the lines of directing that, subject to the preceding purposes, the trustees are to "hold the estate and any accumulations for the wife and her assignees *inter vivos* or *mortis causa*, whom failing then for her heirs *in mobilibus*" (or as may be preferred) "to be ascertained at the time when it shall appear that there is a failure of vesting of capital under the preceding purposes, as if the wife had died immediately thereafter, all according and subject to the law of Scotland."

SUBSECTION (3).—*Ultimate "Events."*

1086. When the ultimate trust purpose is introduced by simple words such as "subject to the foregoing purposes," or "so far as the foregoing purposes shall fail," it is not possible that the ultimate disposal of the estate can be expressed so as not to meet all events. It is otherwise when it is attempted to state the events exhaustively.[1] Thus it is common to provide, first, for there being no issue alive at the wife's death; and second, for the event of the wife being the survivor of the spouses; but this omits the case of the wife predeceasing the husband, leaving a child who fails to take a vested right. Another common form provides, first, for the predecease of the wife, in which case she is expressed to have a power of testing, failing which the fund is destined to her heirs as if she had died unmarried; and then, second, provision is made for the predecease of the husband, in which event, if issue fail to take the capital, the trustees are directed to make over the estate to the wife "or to any person or persons to be named by her," without any reference to "heirs as if she had died unmarried." The assumption of such a form evidently is that, if this second clause operates, the wife will be in life when the fund is made over, but that may not be so, for the failure of vesting may occur after her death. If that were to happen it seems clear that the children would take as the wife's heirs, though they had failed to attain vested interests under the settlement.

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[1] *Anderson's Trs.* v. *Forrest*, 1917 S.C. 321.

[2] *Battye's Trs.* v. *Battye*, 1917 S.C. 385.

SUBSECTION (4).—*Express Power of Disposal.*

1087. It is usual to insert an express power of disposal by the wife in front of the gift to the favoured non-matrimonial objects. It may be that this serves no purpose except to create confidence, but it may have more important effects, and it ought not to be omitted. But a study of published styles, actual settlements, and reported cases shews that the terms of this power require further consideration. Most of the forms refer only to testamentary exercise. This, instead of increasing confidence, diminishes it, for it suggests a doubt regarding the wife's power of *inter vivos* disposal. If the attempt be to prevent her disposing in that way, it seems quite ineffectual. The examination of numerous forms shews a great variety of expressions, and one even finds different expressions in different parts of the same marriage contract. The forms variously bear that the estate may be disposed of by "any writing," "testamentary writing," "will or testamentary writing," "will or other writing," "will or other *mortis causa* settlement," "deed or will," "deed or testamentary writing," or "testament or other deed."

1088. An even more serious criticism is that some forms persistently refer to disposal as the wife "may appoint" or by instrument "to be executed," failing which the estate is given to a specified class by way of testamentary gift. That bequest will supersede and revoke any existing will which may have been made by the settlor, and such an existing will cannot be a testamentary disposal of the estate under the clause in the marriage contract authorising the settlor to dispose by will in the restrictive terms quoted above.[1] Assuming, therefore, that no future will is made, and that the matrimonial trusts fail, the fund would go, not under the previous will, but under the ultimate clause in the marriage contract, which would probably be contrary to intention. The criticisms stated in this and the immediately preceding paragraph will be avoided by a trust for the wife "and her assignees *inter vivos* or *mortis causa*."

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[1] *Scott's Trs.* v. *Scott*, 1902, 10 S.L.T. 122.

Subsection (5).—*The Testamentary Beneficiaries.*

1089. Here also one finds a great variety of expressions in the final part of the clause, namely, the specification of the parties to whom the fund shall go if the wife does not otherwise dispose of it. The fund is variously destined to her "heirs whomsoever," "heirs or (and) assignees," "heirs, executors, and assignees whomsoever," "own heirs, executors, or assignees whomsoever," "heirs and executors whomsoever," "heirs, executors, and successors whomsoever," "next of kin" (probably a pure mistake), "heirs *in mobilibus*" (these last two in different clauses in the same published style), "heirs in moveables according to the law of Scotland," "the persons who would have been entitled (to the same or to her moveable estate) if the wife had died intestate and unmarried." Some of these forms would produce very different results.

Subsection (6).—*Estate affected by the Ultimate Purpose.*

1090. It has been shewn above[2] that a general conveyance is impliedly subject to exceptions, *e.g.* savings from income and all investments of these. But it appears that this special construction of general conveyances is confined to the proper matrimonial purposes, and that the position is different if and when the ultimate and non-matrimonial purpose comes into operation. In the latter case what is under consideration is in effect a will, and the general conveyance then receives the same wide construction which it would receive if it occurred in a document which was expressly and only testamentary.[1] The assets involved in the case cited were savings from income and paraphernal goods. The reference to paraphernal goods suggests the question whether this telescopic quality of general conveyances would hold in a case in which the exceptions from the conveyance were express in the contract of marriage and did not rest on implication from rules of law.

Subsection (7).—*Conversion.*

1091. In the case of *Battye*[3] it was admitted that a sale of heritage by the marriage trustees had the result of converting it to personal succession as regards the ultimate destination, which was in favour of the wife's "heirs, executors, or assignees whomsoever." Both that case and *Anderson* [1] proceeded on the footing that these ultimate directions, though testamentary, may nevertheless be so expressed as to be proper destinations and not merely invocations of intestacy. It is understood that the result is to place the ultimate non-matrimonial beneficiaries in the same position, as regards conversion, as issue of the marriage taking as such under the earlier purposes. It would appear that the framers of model marriage contracts do not favour primogeniture as applied to the ultimate successors, for even when heritage is expressly included, the parties ultimately favoured are usually the heirs *in mobilibus*. This is an important matter, as the wife's side of the deed usually includes *acquirenda*.

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[1] *Bertram's Trs.* v. *Matheson's Tr.*, 1888, 15 R. 572 (Lord Rutherfurd Clark dissenting).

[2] See para. 1064, *supra*.

[3] *Battye's Trs.* v. *Battye*, 1917 S.C. 385.

Subsection (8).—*Domicile.*

1092. In connection with these ultimate purposes the matter of the wife's domicile, and changes in it, may become of great importance. In *Battye* [2] the wife, her estate, and the contract of marriage were Scottish, but by her marriage she became, and she died, a domiciled Englishwoman. Failing issue, which happened, she called by the contract of marriage her "own heirs, executors, or assignees whomsoever." By the precedent of *Anderson* [1] it was admitted that the class was fixed at her own death, and not at the death of her husband over fifty years later; but the question was whether the law of Scotland or of England ruled. If the former (as was held) then her own family took the fund. If the latter, the fund went to her husband, and so passed away to a different family. If the clause was a mere invocation of intestacy, that was necessarily regulated by the law of the intestate's domicile at the date of her death. If, on the other hand, the clause was a true testamentary destination, then it called a selected class; on construction it was held that that meant her heirs according to her domicile when she made the will contained in the ultimate trust purpose of the marriage contract; and by virtue of s. 3 of the Wills Act, 1861,[3] the subsequent change of domicile did not revoke it or affect the construction. Accordingly the estate returned to the settlor's own family.

1093. In some leading Scottish collections of styles, the forms of marriage contracts contain no reference to this matter of domicile, but it is carefully kept in view in England. In the case of the wife it is probably always right to insert words appealing to the law of her domicile at the date of the marriage, for by the marriage her domicile may be changed, and in any case it may, as the law stands, be changed by her husband against her will. But in the case of the husband it may be doubted whether, if for good reasons he voluntarily changes his domicile, he would not desire that his succession should be regulated by the law of the country to which he shifts his domicile.

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[1] *Anderson's Trs.* v. *Forrest*, 1917 S.C. 321.

[2] *Battye's Trs.* v. *Battye*, 1917 S.C. 385.

[3] 24 & 25 Vict. c. 121.

Section 19.—Concurrence of Wife's Father.

1094. It has in the past been usual to make the bride's father a consenter to the marriage contract, even when the lady is major, and though he may be making no provision on the marriage nor coming under any obligation to do so at his death or at any other time; and if the father be dead, the mother may sign in like manner; the intention being simply to record approval of the marriage. It cannot, however, be denied that in certain circumstances this may at least raise a question whether the parent so signing may not have incurred a duty so to deal with his or her own estate by will or otherwise as to fit in with the scheme of the contract of marriage. A claim of that kind was negatived in *Douglas's Trustees* v. *Kay's Trustees.*[1] The general question was dealt with by Lord Dunedin in a more recent case.[2] On the other hand, it is not uncommon for the bride's father to join as a party for the purpose of making substantial provisions, some of the forms of which are noticed in the following paragraphs.

1095. The provision by the wife's father may take the form of the settlement of a landed estate. Assuming that he does not intend to part with the income benefit during his own life, the disposition may be to himself in liferent only, and thereafter to the wife (or to the spouses jointly and the survivor) in liferent only, and to the heir (or children) of the marriage in fee, with or without (*a*) clauses burdening the fee with provisions to the younger children if the fee is destined to the heirs, and (*b*) clauses enabling the wife or the spouses and the survivor to alter and regulate the order of succession to the estate within the descendants of the marriage. Or the wife's father may be prepared to make the benefit immediate, in which case the first liferent will be in his daughter's favour. Even if the disposition is in favour of the daughter, whom failing the issue in fee, the right of the children is contractual, and their mother cannot defeat it gratuitously.[3] On the conveyancing side it is of critical importance to divest the settlor of the fee forthwith. A conveyance to the marriage trustees has this advantage, that the wife's benefit, if a liferent, can be declared alimentary.

1096. The provision may take the form of an obligation by the wife's father to pay an annuity to the wife during the joint lives of himself (the granter) and her. This should be through the medium of a trust and declared alimentary. The incidence of income tax and surtax should be considered.

1097. There is sometimes seen an obligation by the wife's father to leave to his daughter an equal share of his estate along with her brothers and sisters. A clause of this nature is not recommended; it is apt to lead to many questions.[4] Does it mean as much as the most favoured brother or sister, or simply a fractional share corresponding to the number of children, and if so when is the number to be ascertained? In working it out is regard to be had to sums given, or due under contract,[1] to other members of the family, and if so at what date are these to be valued?[2] Is the daughter's share contingent on her surviving her father? And when is it to be paid?[3] What, if any, powers of settling the share are to be reserved to the father?[3] In *Elliot*[1] a father had in his daughter's marriage contract bound himself to pay to her marriage trustees at his death £1000; then by his will he directed payment of his debts and division of his estate among his children equally; it was held that the £1000 was a "debt," and that, in addition, the daughter was entitled to an equal share of the balance of the estate. In *Maude*[3] the father was held entitled to postpone payment, after his death, till the daughter's issue attained twenty-five years of age or married.

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[1] 1879, 7 R. 295.

[2] *Lord Advocate* v. *Stewart's Trs.*, 1906, 8 F. 579.

[3] *Livingstone* v. *Waddell's Trs.*, 1899, 1 F. 831.

[4] *Macqueen* v. *Nasmyth*, 1831, 9 S. 255; *Threshie* v. *Threshie's Trs.*, 1845, 7 D. 403.

1098. Alternatively the wife's father may give an obligation to pay, at his death, to the marriage-contract trustees a specified sum, to be held upon the trusts declared in the marriage contract regarding the estate settled by the wife.

1099. In all cases the matter of death duties calls for consideration. Apart from contract, the result as regards estate duty varies according as the provision is heritable or personal estate, or charged upon or payable out of heritable estate. The question is whether the duty is to fall on the payer or the payees; succession duty always falls on the payees apart from contract to the contrary.[4]

PART II.—SECOND AND SUBSEQUENT MARRIAGES.

SECTION 1.—POWER TO ENCROACH ON PROVISIONS MADE ON FORMER MARRIAGES.

SUBSECTION (1).—*Implied Power.*

1100. In the absence of express reserved power to that effect, two general conditions apply to any attempt to encroach for the benefit of wife or children of a subsequent marriage on the provisions previously made on a former marriage: (1) the provisions on the later marriage must be reasonable in amount; and (2) the husband must be without any other source from which to make the provisions on the later marriage.[5] If it should afterwards happen that the husband's resources increase, the children of the first marriage are said[6] to have right of recourse for their indemnity, and that is in accordance with principle as based on warrandice. In the older writers this question is always stated on the assumption that it arises only with reference to the husband and father, but it may well arise also in the case of the wife and mother who has already, on a previous marriage, granted a general conveyance, with or without the intervention of trustees. Indeed, it is with reference to that very case that express powers are now frequently inserted to meet the event of the lady entering into a second marriage.

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[1] *Elliot* v. *Bowhill*, 1873, 11 M. 735.

[2] *Crocker* v. *Crocker*, [1916] 1 Ch. 25.

[3] *Maude* v. *Wright's Trs.*, 1878, 5 R. 570.

[4] *Alexander's Trs.* v. *Alexander's Trs.*, 1910 S.C. 637; *Dundas's Trs.* v. *Dundas's Trs.*, 1912 S.C. 371.

[5] *Arthur and Seymour* v. *Lamb*, 1870, 8 M. 928.

[6] Ersk. iii. 8, 42.

1101. A perusal of the passage on this subject in the second edition of M'Laren on Wills and Succession[1] shews that it is left in much uncertainty. There is undoubtedly a considerable amount of case law on the subject, but mostly of early date. It has to be remembered, on the one hand, that many marriage provisions take the form of (*a*) the destination of land to the father and the heir of the marriage, or (*b*) an unsecured general obligation to pay to the children, or (*c*) a general conveyance which, as has been seen, was often held to amount to little more than an obligation, and to leave the granter absolute owner of the estate, no *inter vivos* trust being created. Then, on the other hand, obligations undertaken on a second marriage are as onerous as those undertaken on a first marriage. The heir of the first marriage takes the landed estate, subject to liability for debts, and this includes reasonable obligations on a second or any subsequent marriage.[2] Unsecured personal obligations to the children of a first marriage can rank on the father's estate only *pari passu* with like obligations to children of subsequent marriages; and if security has been given for the latter and not for the former, it is elementary that to the extent of the security the second and third families will oust the first family. As to a general conveyance to the first family, it has been seen above[3] that it may not divest the granter, but may leave him *in titulo* to alienate, burden, and incur obligations, the estate finally being ascertained *deductis debitis*.[4]

1102. It is, however, a different thing to say that if, on his first marriage, a man has by antenuptial contract of marriage placed a sum of money or investments in trust for the wife, or children, or wife and children of that marriage, he can, on a subsequent marriage, vary the trusts so as to introduce the wife and children of the later marriage, or any of them, as objects of the trust, and there is no authority for that proposition. The same holds, though the provision for the first marriage rests only on obligation, but with specific security, duly completed before the second marriage.[5] And the same appears to hold with reference to the suggestion of the power of a woman, in terms or in effect, to withdraw for the benefit of husband or children of a later marriage any part of the assets which fall under a general conveyance in modern form granted by her in favour of trustees on a former marriage, and under which the trustees are entitled and bound to enter into possession immediately after the granting of the general conveyance, or as the assets come to their knowledge.

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[1] Sec. 1227.

[2] *Leslie* v. *M'Leod*, 1870, 8 M. (H.L.) 99.

[3] See para. 1016, *supra*.

[4] *Arthur and Seymour* v. *Lamb*, 1870, 8 M. 928; *Haldane* v. *Hutchison*, 13 R. 179.

[5] *Walkinshaw's Trs.* v. *Walkinshaw*, 1872, 10 M. 763.

1103. In connection with these questions it is to be remembered that a man may have and leave issue by several marriages, but he can have only one widow. Yet even as to the widow it may happen that divorce may result in one or more widows' claims during his life, and two or more after his death. On the one hand, there are provisions in respect of which the second wife and only true widow must exclude the first wife, who has obtained divorce, *e.g.* under a widow's fund; as to an entail provision see the case cited.[1] On the other hand, one would be slow to believe that the divorcing wife who, during her husband's life, entered into enjoyment of the liferent of a trust fund settled by her husband under her contract of marriage, can in any circumstances be required, after her husband's death, to suffer any diminution of her interest in favour of a second wife and the true widow.

SUBSECTION (2).—*Express Reserved Power.*

1104. As a practical question under present-day practice it is chiefly with reference to the modern type of general conveyance that there has to be considered the suggestion that, as the lady is settling her all, it may be proper to reserve power to make provisions for a subsequent marriage. It is all the more serious if the provisions made for her by her husband are to cease or be materially curtailed if she should remarry. The like question arises regarding any settlement made by the wife's father. Opinions will probably differ as to the rights of the case in the event of dissolution of the marriage by divorce at the husband's instance. Consideration may also require to be given to the known or probable effects of the legally implied, and any express, restrictions on the extent of a general conveyance.[2] It may be that, between the date of dissolution of the first marriage and the date of the second marriage, the wife has succeeded to estate of an amount equal to what has fallen under her first marriage trust. Indeed, even at the date of dissolution of the first marriage she might possess, outside that trust, a fortune as considerable as, or more considerable than, that trust fund. It will be noted that the exceptions from the first settlement will be included in any general conveyance contained in the second marriage contract; savings from income during the subsistence of the first marriage, and all investments and increments of these, are a good example.

SECTION 2.—FORM OF RESERVED POWER.

1105. If some form of reserved power is to be inserted in the first marriage contract there is a choice of various alternatives which will work differently. (1) There may be a power to the wife to withdraw part of the capital on a subsequent marriage, on condition of settling it on matrimonial purposes for the latter marriage. An objection is that if these latter purposes fail, the withdrawn money will then be at the wife's sole disposal. A power on those lines would be open to abuse on the occasion of a subsequent marriage under conditions when the birth of issue of that marriage was either impossible or highly improbable. (2) The issue of a subsequent marriage may, in the first marriage contract, be included as objects of the power of appointment, if any, reserved to the wife; but unless qualified, she might then exclude the children of the first marriage, and, on the other hand, it might not be competent for her to make any contractual provision for the second family. (3) There may be a power to the wife, in the event of a subsequent marriage, to alter the trusts so as to include both families, and to do so by *inter vivos* irrevocable deed so far as to determine that the descendants of the later marriage shall take a certain amount or share, but leaving the interest of each individual to be fixed by will. Any provision for another husband will naturally take the form of a partial liferent, on survivance, while widower. The wife may reserve power to create this by deed or will, or only by will. The liferent will naturally affect *primo loco* the fee of the part of the *corpus* going to his children.

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[1] *Somervell's Trs.* v. *Dawes*, 1903, 5 F. 1065.

[2] See para. 1055 *et seq.*, *supra.*

1106. It may be thought proper that, as a *quid pro quo* for encroaching on the first fund, the wife should be bound to bring into settlement on the later marriage all estate then belonging to her or which may during the subsistence of that marriage be acquired by her, the two funds being massed for common benefit.

SECTION 3.—SUBSEQUENT MARRIAGE CONTRACT.

1107. In the preparation of a contract of marriage on a second or later marriage, something like the same importance may attach to the terms of any prior contract or contracts as attaches to any contract of marriage when a will is being prepared for the husband or the wife. Certain general considerations arise. Inquiry will be made as to the marriage contract on the first marriage, and whether the parent has undertaken any obligations in the contracts of marriage of any of the children of the first marriage; and those deeds will be examined. From the nature of the case it will probably be impossible to improve the legal position by effectual consents by the parties who may be adversely interested. If there are any relevant reserved powers in the first contract of marriage, these powers will be expressly exercised and in the best technical form. Otherwise, so far as the provisions in the second contract are intended to compete with those in the former contract, it appears to be expedient, if not essential, to make that intention express on the face of the second contract. There should also be preserved evidence of the granter's financial position in order to shew that no other source is available from which to make provision on the later marriage.

1108. What has been said above[1] suggests that in some cases there may be virtue in putting the new provisions in the form of obligations creating *jura crediti* so as to give them the status of debts. Whatever form the provisions in the new contract may take, but especially if it contains a new general conveyance, or assignations of specific assets, it will be judicious to record evidence to shew what part of the granter's estate does not fall under any general conveyance in the former contract, and indeed it is suggested that it will be well that any new general conveyance should be followed by a detailed specification of investments and assets which are free to fall under it, with the usual precautionary words "including without prejudice to the foregoing generality."

PART III.—POSTNUPTIAL CONTRACTS.

SECTION 1.—INTRODUCTORY.

1109. So far as regards provisions by the one spouse in favour of the other, deeds of this class have been vitally affected by the change in the law by which donations between husband and wife are now irrevocable unless sequestration follows within year and day of the donation.[2] The point is that formerly a postnuptial marriage contract, so far as operating in favour of one of the spouses (usually the wife), might be regarded in law as amounting to a donation as distinguished from a provision; if so, it was to that extent revocable by the donor, and therefore it could not in such a case stand against the creditors of the donor, even though they could not establish a case under the old bankruptcy statutes. Now it is not revocable by the donor, and, as regards creditors, that special ground of challenge has disappeared.

SECTION 2.—REVOCATION.

1110. There is no rule to the effect that a postnuptial contract of marriage is revocable by the spouses jointly. Reasons to the contrary may be found in the facts (1) that alimentary interests have been validly created,[3] or (2) that the wife is protected against her own acts,[4] or (3) that the interests of children or remoter issue are or may be affected.[5] The protection of an express alimentary clause applicable to the wife's liferent was in *Mackenzie's* case upheld when the estate protected was that of the wife herself. The decision in *Barras* proceeded partly on the authority of *Menzies* v. *Murray*,[6] as to which see below.[7] But revocation by the husband with consent of the wife has been allowed notwithstanding an alimentary clause when the deed of settlement was unilateral and the circumstances very exceptional.[1] In that case, however, Lord M'Laren indicated the view that, in the absence of children's interests, a postnuptial contract of marriage is revocable by the spouses jointly, even when the wife's provisions are secured through a trust. The contrary opinion was stated *obiter* by Lord Low in *Peddie.*[2]

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[1] See para. 1044 *et seq.*, *supra.*

[2] Married Women's Property (Scotland) Act, 1920 (10 & 11 Geo. V. c. 64), s. 5.

[3] *Mackenzie* v. *Banks*, 1886, 24 S.L.R. 230.

[4] *Barras* v. *Scottish Widows' Fund Society*, 1900, 2 F. 1094.

[5] *Allan* v. *Kerr*, 1869, 8 M. 34; *Low* v. *Low's Trs.*, 1877, 5 R. 185.

[6] 1875, 2 R. 507; also *Peddie* v. *Peddie's Trs.*, 1891, 18 R. 491.

[7] See para. 1122, *infra.*

SECTION 3.—ABSOLUTE OR PROVISIONAL.

1111. The importance of making clear what is the true quality of a deed between husband and wife is well exemplified in the case of *Pirie.*[3] The husband had made no antenuptial provision. He assigned to his wife a policy of assurance on his life, maturing on his death, but having a surrender value during his life. The deed bore to be granted for onerous considerations, and in it the husband undertook to pay the premiums, and he did so. The deed was delivered and intimated to the insurance company. The wife predeceased, and the husband on a second marriage assigned the same policy to his second wife. On his death a competition arose between the widow and the executors of the first wife. In the absence of proof that the first wife had given value for the assignation in her favour, it was held that the presumption was that it was intended to take effect only if the grantee survived her husband, and the widow was preferred. The apparently contradictory elements in the case were reconciled by Lord Cullen's dictum that the first wife received a *de præsenti* right, although the use to be made of it was contingent on her survivance. On the other hand, a general conveyance, contained in a postnuptial contract, by wife to husband of her whole estate was held [4] in the House of Lords (reversing the First Division) to take effect *inter vivos* notwithstanding that it contained also an appointment of the husband to be "the executor and universal legator" of the wife; but the husband gave consideration, namely, a substantial annuity to the wife though only if she survived him, and his entry to the land disponed to him was declared to be at the term of Whitsunday preceding the date of the deed.

SECTION 4.—DONATION OR PROVISION.

1112. Notwithstanding the passing of the Married Women's Property (Scotland) Act, 1920,[5] the distinction between donation and provision may still be important. If a right takes effect before the death of the granter it cannot rank as a matrimonial provision, and an averment that it was intended to be a matrimonial provision is irrelevant.[6] In the case cited what was involved was a transfer by husband to wife of shares in a company, and it took immediate effect by delivery and registration. *In dubio* the following are suggestive *indicia* of a proper provision: (1) no antenuptial provision or an inadequate one; (2) the nature of the asset conveyed, *e.g.* a policy on the husband's life payable on his death or any other asset which in ordinary course would become productive only on or after his death.[1]

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[1] *Gillon's Trs.* v. *Gillon*, 1903, 5 F. 533.

[2] 1875, 2 R. 507; also *Peddie* v. *Peddie's Trs.*, 1891, 18 R. 491.

[3] *Pirie* v. *Pirie*, 1921 S.C. 781.

[4] *Buchanan's Trs.* v. *Whyte*, 1890, 17 R. (H.L.) 53.

[5] 10 & 11 Geo. V. c. 64.

[6] *Anderson* v. *Anderson*, 1903, 5 F. 323.

SECTION 5.—AS AGAINST CREDITORS.

1113. The creditors are entitled to the presumption of insolvency as at the date when the provision was constituted, but if those seeking to uphold the deed can prove that the granter was then solvent, and if the conveyancing was complete,[2] the deed will stand.[3] Lord M'Laren was not prepared to admit that, either under statute or at common law, the test of insolvency was whether the granter remained solvent after allowing for the effect of the deed: his lordship preferred the test of the state of the granter's finances at the date of the deed.[4] It is not absolutely clear that a husband, though insolvent, is not entitled to make a provision for his wife, in the event only of her surviving him, if she is otherwise unprovided for, if the provision is reasonable in amount according to his position, and especially if accepted in discharge of legal rights, but the authorities afford little support to the validity of such a provision.[5] In *Guthrie's* case the question was put from the Bench—"Is a provision reasonable at all when a man has nothing?" The case of *Corbidge* [3] is instructive on the question of what may be held to be not an excessive provision for a widow. It is also a modern instance of a postnuptial provision by a father in favour of children being upheld against the trustee in his subsequent sequestration, because he was solvent when the provision was made and the conveyancing part was complete.

SECTION 6.—CONTRACTUAL MUTUAL WILL.

1114. A mutual will made by husband and wife, if on an examination of all the facts and circumstances, including the language and substance of the instrument, it is held to be contractual between the spouses, closely resembles a postnuptial contract of marriage. But a mutual will, though onerous and contractual, cannot, consistently with its design, contain any provisions to take effect while both spouses survive, except indeed, if it be an exception, that it may contain clauses extinguishing the legal rights of the spouses. Further, under a mutual will there can be no *jus quæsitum* in third parties which could prevent the spouses by mutual consent cancelling the whole document.[6] In *Low* [7] the rights of possible children were the obstacle to allowing revocation, but the deed, which was by the husband only, contained a conveyance to trustees, it was delivered to them, and they had administered the property; there was diversity of opinion as to the true quality of the deed. The subject of the application to postnuptial contracts of marriage of the distinctions between the quality of benefits conceived in favour of parties who are, and those who are not, within the marriage consideration[1] has not been made matter of decision. The position in the event of divorce will or may be different according as it is held that the instrument is a postnuptial marriage contract or a mutual will.

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[1] Per Lord President Clyde in *Pirie* v. *Pirie*, 1921 S.C. 781.

[2] *Miller* v. *Learmonth*, 1870, 42 Sc. Jur. (H.L.) 418; *Campbell's Trs.* v. *Whyte*, 1884, 11 R. 1078; *Dunn's Trs.*, 1896, 4 S.L.T. 46.

[3] *Corbidge* v. *Somerville's Trs.*, 1911 S.C. 1326.

[4] *M'Lay* v. *M'Queen*, 1899, 1 F. 804.

[5] *Guthrie* v. *Cowan*, 1846, 9 D. 124; *Robertson's Trs.* v. *Robertson*, 1901, 3 F. 359; M'Laren on Wills and Succession, s. 1209.

[6] Cf. *Corrance's Trs.* v. *Glen*, 1903, 5 F. 777.

[7] *Low* v. *Low's Trs.*, 1877, 5 R. 185.

SECTION 7.—PROTECTED LIFERENTS.

1115. The rule that to secure the efficacy of an alimentary clause it is necessary to have a continuing trust holds in the case of liferents under postnuptial contracts. In the case of a liferent to the husband in funds provided by himself there can be no valid protection. There is authority for the view that it is otherwise in regard to the wife's liferent of her own estate.[2] Further, it was the rule that in no case could the wife be allowed, in competition with creditors, to derive any benefit from her husband's estate, under a postnuptial settlement, during his life. If that question arose, the income, if given absolutely to the wife, passed to the creditors for the period of the joint lives of the spouses.[3] But this may be changed by the Married Women's Property (Scotland) Act, 1900.[4]

SECTION 8.—LEGITIM.

1116. It is not competent in a postnuptial deed to discharge the children's legitim. But clauses may be inserted that any child claiming legitim from the estate of either parent shall forfeit, for himself or herself and his or her issue, all claim under the deed, and carrying over all forfeited shares to the children who do not claim legitim or their issue.

SECTION 9.—PROTECTED LIFE POLICIES.

1117. Reference is made to Part I. Section 6, above.

PART IV.—ACCELERATION OF WINDING-UP.

SECTION 1.—INTRODUCTION.

1118. The rules governing proposals to accelerate the winding-up of a marriage trust differ from those applicable in other trusts in the following respects. First, special rules against acceleration are that during the subsistence of the marriage, (1) an alimentary clause is effectual even as regards the income rights of the wife in funds settled by herself; and (2) even without an alimentary clause, her rights in all funds, however derived, are, as the decisions stand, protected against any proposal to terminate the trust. This is limited to trust cases and is known as the wife's matrimonial trust protection.[1] Second, a special rule in favour of acceleration is that the interests of substitutes may be defeated by the settlor by himself or herself alone, unless it appears that those rights were made matter of contract between the spouses, and even then they may be defeated by the spouses jointly. Divorce, though it may extinguish a liferent, does not accelerate either payment or vesting of the rights in the *corpus*.[2]

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[1] Cf. *Hedderwick* v. *Morison*, 1901, 4 F. 163.

[2] See para. 1024, *supra*.

[3] *Dunlop* v. *Johnston*, 1867, 5 M. (H.L.) 22; *Robertson's Trs.* v. *Robertson*, 1901, 3 F. 359.

[4] *Bruce* v. *Murray*, 1926 S.L.T. 236.

SECTION 2.—THE WIFE'S MATRIMONIAL TRUST PROTECTION.

SUBSECTION (1).—*The Doctrine.*

1119. The question arises—and has in practice arisen—whether by the Sex Disqualification (Removal) Act, 1919,[3] and the Married Women's Property (Scotland) Act, 1920,[4] or either of them, or in any other way by the social changes of which those Acts are important indications, there has been removed or modified the protection or disability which the law, as judicially declared or made, has extended to or visited on married women in respect of the inviolability of marriage provisions in their favour when protected by a trust. The doctrine is, or was, that when in an antenuptial contract of marriage a provision is reserved or made for the wife through the medium of a trust, and whether from her own estate or her side of the house or from her husband's estate or his side of the house, and whether to take effect during the marriage or after its dissolution, she cannot, even with her husband's consent, during the marriage, bring the trust to an end by discharging the provision or otherwise; and that it makes no difference though there is in the contract no declaration of its irrevocability, though there is no alimentary or similar clause attached to the provision, though there are no other objects of the trust such as children, and though the wife may be long past the age of child-bearing, or though other beneficiaries all competently consent. The doctrine rests on case law.

1120. *Torry Anderson* v. *Buchanan*[5] was a decision of the whole Court with five dissents of powerful authority. The attempt to terminate the trust was disallowed. The question did not arise purely, for much importance was placed by the majority on a declaration of irrevocability, and there was a point as to the legal difficulty of holding issue impossible. Lord Jeffrey, who dissented, said, "A single woman with a separate estate may frequently need all the protection which the law can give her against the influence of a domineering father or brother or a wheedling or extravagant mother or sister, and it is matter of daily observation that both men and women of facile dispositions are constantly made the victims of far worse influences than those of the common run of husbands." In *Pringle* v. *Anderson*,[1] which for reasons similar to those which applied in *Torry Anderson* was not a pure case, Lord Kinloch, Ordinary, upheld the sanctity of the trust out of deference to the earlier case and against his own opinion, which was in accord with that of the minority in that case.

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[1] See para. 1119, *infra*.
[2] *Gavin's Trs.* v. *Johnston's Trs.*, 1903, 5 F. (H.L.) 24.
[3] 9 & 10 Geo. V. c. 71.
[4] 10 & 11 Geo. V. c. 64.
[5] 1837, 15 S. 1873.

1121. *Pringle's* case [1] shewed something approaching confusion as to the nature and extent of the protection. The Lord Ordinary went so far as to give declarator that the wife had no power during the subsistence of the marriage, even with her husband's consent, to grant any deed alienating or encumbering her provision or the subject-matter of it. This was recalled in the Inner House on the view that it was a separate question which did not arise and which would be considered when it did arise. The decision was limited to a declarator that the trust must subsist. The opinions from the Bench stressed the distinction between the two things. But while that was so, it was made clear that all that was meant was the possible validity of, in the words of the Lord Justice-Clerk, "deeds which may be executed during the trust, which shall not disturb the trust," *e.g.* "a disposition for onerous causes to come into operation on the death of Mrs. Anderson." But the later case of *Halkett*[2] shews that this conception of the scope of exceptions stops far short of the position now authoritatively declared.

1122. The modern doctrine is to be found in *Menzies* v. *Murray*.[3] The attempt to accelerate winding-up was disallowed. It is both interesting and important to consider the reasons and grounds of judgment in the light of modern developments, legislative and otherwise. Lord Justice-Clerk Moncreiff said: "It would be hard to say that the relatives of a bride who brings her husband a considerable fortune should have no power, by any instrument a conveyancer can frame, to place her means of future subsistence beyond the reach of matrimonial importunity."

1123. But it is understood that the doctrine goes further than that and applies to the wife's rights in any estate, however derived, if placed under an antenuptial matrimonial trust settlement. On the other hand, *Halkett's* case [2] shews that the protection does not secure subsistence whether present or future. And every conveyancer knows how to protect through a trust, namely, by adding an alimentary clause. Lord Deas spoke of the wife's inability to undo the trust as a "wise and equitable protection, not unknown in other relations of society, as, for instance, in the case of persons under age, weak and facile individuals, and so on. . . . It is founded in nature—the admirable subjugation of the will of the one sex to the pleasure of the other for the mutual benefit. . . . If not already universally received, it can only be a question of time its being recognised in some form or other in every civilised country." His lordship also spoke of "protection against marital influence on the one hand and self-sacrifice on the other." But since then donations by wife to husband have been made irrevocable.[1] That would seem to cover an absolute assignment by her to him of her non-alimentary rights, present and future, under their marriage contract. In like manner Lord Deas' reference to the analogy of pupils and imbeciles may now be displaced by the grant, in the 1920 Act, to married women of power of contracting, alienating, and encumbering without the consent or knowledge of their husbands.[2] Lord Neaves proceeded on the theory that a married woman is to be "protected as if her will and mind were in abeyance," whence the conclusion was drawn that she was prevented from relaxing her trust protection "in favour of her natural guardian for such he (the husband) now is." The abeyance assumption is ended by the new statutory powers of independent action, and by the same Act the husband's curatorial or administrative status, capacity, or power is abolished.[3]

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[1] 1868, 6 M. 982.

[2] *Reliance Mutual Life Assurance Society* v. *Halkett's Factor*, 1891, 18 R. 615.

[3] 1875, 2 R. 507.

SUBSECTION (2).—*The Present Position.*

1124. The case of *Menzies*[4] has been followed[5] consistently, but no such case has occurred subsequently to the legislation of 1919 and 1920. The sphere of the doctrine is not in fact very extensive, for wherever there is an alimentary clause, as in carefully prepared settlements there always is, that particular clause bars both the winding-up of the trust and the alienation of the provision under the trust, without the necessity of invoking any general doctrine of the wife's inherent disability or protection. But cases such as *Menzies* do from time to time arise, and the question now is whether, after the legislation referred to, any legal disability can attach to a woman during marriage and simply by reason of marriage. The conception and general scope and aim of the Acts of 1919 and 1920 are antagonistic to any such disability, yet curiously enough the language of the 1920 Act is not altogether happy in this immediate connection. Sec. 1 provides that a married woman shall "with regard to her estate" have the same powers of "disposal as if she were unmarried"; and any deed by her shall be as valid and effectual "as if executed by her with consent of her husband according to the present law and practice." On which it may be remarked (1) the marriage contract estate in question is not "her estate," and may never have been so; (2) to terminate a trust is not an act of "disposal"; (3) the standard "as if she were unmarried" advances nothing, for the situation could not then have arisen at all; (4) the declaration that her deed without her husband's consent shall be as valid as if he had concurred is even less helpful, for on the doctrine of *Menzies* the husband's concurrence is useless. If the wife can alienate absolutely, and does so, she has then no interest which can be protected. It is noted for consideration whether s. 6 of the 1920 Act[1] perpetuates the doctrine and authority of *Menzies*.

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[1] Married Women's Property (Scotland) Act, 1920, s. 5.

[2] *Ibid.*, s. 3. [3] *Ibid.*, s. 2. [4] *Menzies* v. *Murray*, 1875, 2 R. 507.

[5] *Halkett* v. *Halkett's Judicial Factor*, 1890, 17 R. 719; *Ker's Trs.* v. *Ker*, 1895, 23 R. 317; *Peddie* v. *Peddie's Trs.*, 1891, 18 R. 491; *Barras* v. *Scottish Widows' Fund*, 1900, 2 F. 1094; *Mackenzie* v. *Banks*, 1886, 24 S.L.R. 230.

Subsection (3).—*Cases where Acceleration refused.*

1125. In addition to the cases dealt with in the preceding subsections there are those earlier cited,[2] which may be regarded as having been decided on the doctrine of the wife's matrimonial trust protection. In a number of other cases acceleration of the winding-up of a marriage trust has been refused on quite other grounds, and indeed several of the attempts were made after the dissolution of the marriage, and even after the wife's death. The existence of an alimentary liferent,[3] even when combined with the fee, is a bar to denuding, whether the surviving spouse and alimentary liferenter be the husband[4] or the wife.[5] The possibility of children or of further children,[6] or (according to the vesting) of the death of children leaving issue,[7] is also a bar.

Subsection (4).—*Cases where Acceleration allowed.*

1126. In the condition of matters noted in the immediately preceding paragraph it is not surprising to find that all the cases of acceleration proper have been after the dissolution of the marriage. Even then it is permissible only if the following conditions concur: (1) that any limited interest—liferent or annuity—shall be non-alimentary; and (2) that there shall be the consent of the parties entitled to the whole *corpus*, all *sui juris*, and with absolutely vested interests. These conditions being fulfilled, there can be no contradictor.[8] The cases of *Ramsay*,[9] *Stillie*,[10] and *De la Chaumette*[11] are hardly even apparent exceptions. *Ramsay* is indeed rather an example of the rule, for part only of the estate was allowed to be paid out, and as to that part all interests were held to be validly represented. In *Stillie* the marriage-contract trustees were, after the husband's death, ordained to denude in favour of the husband's testamentary trustees, a much larger alimentary annuity having been bequeathed to the widow by the husband's will than the non-alimentary annuity covenanted in the marriage contract to be paid to her. In *De la Chaumette* the parties had been married for twenty-five years; no child had been born; and the wife was nearly seventy. The trust fund had been settled in trust for the alimentary liferent of the spouse and the survivor; but on the application of the spouses the trustees were held entitled to invest the whole capital in an annuity on the lives of the spouses and the survivor, the annuity to be taken in the names of the trustees and to be expressly alimentary.

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[1] See para. 996, *supra*.

[2] See para. 1110, *supra*.

[3] *Reid* v. *Reid's Trs.*, 1899, 1 F. 969; *Dewar's Trs.* v. *Dewar*, 1910 S.C. 730.

[4] *Main's Trs.* v. *Main*, 1917 S.C. 660.

[5] *Eliott's Trs.* v. *Eliott*, 1894, 21 R. 975.

[6] *Reid* v. *Reid's Trs.*, *supra*; *Wilken's Trs.* v. *Wilken*, 1904, 6 F. 655. The following were under postnuptial deeds: *Allan* v. *Kerr*, 1869, 8 M. 34; *Low* v. *Low's Trs.*, 1877, 5 R. 185

[7] *Hughes* v. *Edwardes*, 1892, 19 R. (H.L.) 33.

[8] *M'Lean's Trs.* v. *M'Lean*, 1878, 5 R. 679; *Grant* v. *Grant's Trs.*, 1876, 3 R. 280; *Knox* v. *Knox's Trs.*, 1887, 24 S.L.R. 282; *Crawford* v. *Crawford's Trs.*, 1873, 11 S.L.R. 2; *M'Murdo's Trs.* v. *M'Murdo*, 1897, 24 R. 458; *Mackie's Judicial Factor*, 1920, 2 S.L.T. 95.

[9] *Ramsay* v. *Ramsay's Trs.*, 1871, 10 M. 120.

[10] *Stillie's Trs.* v. *Stillie's Trs.*, 1901, 3 F. 1054.

[11] *De la Chaumette's Trs.* v. *De la Chaumette*, 1902, 4 F. 745.

MARRIED WOMAN.

MARRIED WOMEN'S POLICIES OF ASSURANCE ACT.

MARRIED WOMEN'S PROPERTY ACTS.

See HUSBAND AND WIFE.

MARTIAL LAW.

See ARMED FORCES OF THE CROWN.

MASTER AND SERVANT.

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SECTION 1.—INTRODUCTORY.

1127. The general rules of law regulating a contract of service are discussed elsewhere in this work.[1] Consideration was there given to the constitution of the contract, its effect as regards the reciprocal duties of master and servant and their respective remedies for breach of the contract, and also to the extent of the master's liability for his servant's acts. It is not proposed to deal further here with the common law of the contract of service, but there are certain statutes which modify the ordinary rules of law regulating the relations of master and servant, particularly in regard to the industrial world. The statutes here considered fall into three classes: (1) Those dealing with industrial disputes, (2) those imposing liability on employers in respect of injuries sustained by their workmen in their employment, and (3) those imposing restriction upon payment of wages otherwise than in money. It is proposed to discuss these statutes, and also to treat of the question of apprenticeship.

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[1] See HIRING, Vol. VII. p. 590, *ante*, *sub voce* Hiring of Service.

SECTION 2.—EMPLOYERS AND WORKMEN ACT, 1875.[1]

1128. The Masters and Servants Act, 1823,[2] under which masters had the power of enforcing by imprisonment the contract of service against their workmen, and amending Acts were repealed by the Conspiracy and Protection of Property Act, 1875.[3] In the same session of Parliament the Employers and Workmen Act, 1875,[1] was passed, and placed the relationship upon a new footing.

SUBSECTION (1).—*Powers conferred on Court.*

1129. In any proceeding before a County Court (which in Scotland means a Sheriff Court) in relation to any dispute between an employer and a workman, arising out of or incidental to their relation as such, the Court may, in addition to any jurisdiction it might have exercised if the Act had not passed, exercise all or any of the following powers:—

1. It may adjust or set off, the one against the other, all such claims on the part either of the employer or the workman, arising out of or incidental to the relation between them, as the Court may find to be subsisting, whether such claims are liquidated or unliquidated, and are for wages, damages, or otherwise; and

2. If, having regard to all the circumstances of the case, it thinks it just to do so, it may rescind any contract between the employer and the workman upon such terms as to the apportionment of wages or other sums due thereunder, and as to the payment of wages or damages or other sums due, as it thinks just; and

3. Where the Court might otherwise award damages for any breach of contract it may, if the defendant be willing to give security to the satisfaction of the Court for the performance by him of so much of the contract as remains unperformed, with the consent of the plaintiff, accept such security and order performance of the contract accordingly, in place either of the whole of the damages which would otherwise have been awarded or some part of such damages.[4]

1130. By s. 4 a Court of Summary Jurisdiction (defined to be, in Scotland, the Sheriff's Small Debt Court) may, in a proceeding in relation to any dispute under the Act between an employer and a workman, order payment of any sum which it may find to be due as wages, or damages, or otherwise, and may exercise all or any of the powers by the

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[1] 38 & 39 Vict. c. 90.

[2] 4 Geo. IV. c. 34.

[3] 38 & 39 Vict. c. 86, s. 17.

[4] 38 & 39 Vict c. 90, s. 3.

Act conferred on a County Court. It is provided, however, that the Court of Summary Jurisdiction (1) shall not exercise any jurisdiction where the amount claimed exceeds £10, and (2) shall not make an order for the payment of any sum exceeding £10 exclusive of the costs incurred in the case, and (3) shall not require security to an amount exceeding £10 from any defendant or his surety or sureties. Sec. 11 of the Act lays down that in the case of a child, young person, or woman, subject to the Factory Acts, any forfeiture on the ground of absence or leaving work shall not be deducted from or set off against a claim for wages or other sum due for work done before such absence or leaving work, except to the amount of the damage (if any) which the employer may have sustained by reason of such absence or leaving work. This section seems to limit the extensive powers given to the Court by ss. 3 and 4.[1] Otherwise the jurisdiction of the Court is very wide. It is not strictly confined to the consideration of the claim made before it, but can deal with all disputes which may appear in the course of the hearing to have arisen between master and workman.[2]

1131. There is no power given to the Court by this Act to order the imprisonment of the workman for breach of contract, or, in default of finding caution, to complete the contract. As the Conspiracy and Protection of Property Act passed in the same session repeals all previous statutes,[3] and this statute gives the Court only the powers above mentioned in dealing with disputes between employer and workman, it seems to abolish imprisonment for breach of this contract both by statute and common law. It may, at any rate, be assumed that no judge would now order the imprisonment of a defaulting servant. Exercise of the powers given to the Court is not restricted to cases brought specifically as under the Act.[4]

SUBSECTION (2).—*What is a Dispute?*

1132. The powers are only to be exercised by the Court in the event of a dispute between master and workman arising out of the contract, and this has been interpreted to mean any claim by either party arising out of the contract. It may be a claim of damages for breach of contract,[5] or a claim for a penalty stipulated in the contract,[6] or a claim of damages for injury to the master's property.[7] It has been held competent to set off the amount of wages due to the workman against a claim of damages by the employer, even though the workman had not put forward his claim for wages; [8] but a claim under the Act for damages against the servant was held competent, although the servant had already brought an action for wages and got decree, and the employer had made no claim by way of set-off in that action.[1] Successive actions cannot be raised under the Act in respect of one continuing breach of contract.[2]

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[1] *Warburton* v. *Heyworth*, 1880, 6 Q.B.D. 1.

[2] *Hanley* v. *Pease and Partners*, [1915] 1 K.B. 698.

[3] 38 & 39 Vict. c. 86, s. 17.

[4] *Coghill & Son* v. *Storen*, 1877, 1 Guthrie's Sh. Ct. Ca. 373.

[5] *Clemson* v. *Hubbard*, 1876, 1 Ex. D. 179; *Wynnstay Collieries* v. *Edwards*, 1898, 79 L.T. 378; *Bowes* v. *Press*, [1894] 1 Q.B. 202; *Grainger* v. *Aynsley*, 1880, 6 Q.B.D. 182; *James* v. *Evans & Co.*, [1897] 2 Q.B. 180.

[6] *Buxton Lime Firms Co.* v. *Howe*, [1900] 2 Q.B. 232.

[7] *Hindley* v. *Haslam*, 1878, 3 Q.B.D. 481.

[8] *Keates* v. *Lewis Merthyr Consolidated Collieries*, [1911] A.C. 641.

SUBSECTION (3).—*Rescission of Contract.*

1133. The Court has power to rescind any contract between the employer and the workman, and the question has been raised whether that extends to an arbitration clause in the contract. In the case of *Wilson* v. *Glasgow Tramways and Omnibus Co.*[3] the Court did not decide the point, although it was there raised, but Lord Adam, on circuit, decided that as the clause of arbitration was a part of the contract of service it was competent for the Sheriff to rescind it as well as the rest of the contract, and to decide the case on the equities.[4]

SUBSECTION (4).—*The Persons under the Act.*

1134. Sec. 10 defines a workman under the Act. The expression "workman" does not include a domestic or menial servant, but, save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-five years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of the Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour. This definition of a workman has also been adopted by reference in the Employers' Liability Act, 1880,[5] and there have been numerous decisions in cases brought under that Act as to its significance and effect. Although domestic and menial servants are excluded by the definition, a woman who is employed with a view to the discharge of duties connected with husbandry, but also performs domestic duties ancilliary to those which she was employed to discharge, may fall within the scope of the Act.[6] A woman who was employed as a "kitchen-woman and byre-woman" by a farmer was held to be an agricultural and not a domestic servant.[7] A potman in a public-house, a head gardener, a huntsman, and a general worker about the garden and stables are all menial servants, and not within the definition.[8] A man whose duty it was to clean out an office and act as night watchman was held to be, in respect of his former duty, a domestic servant, and, in respect of the latter, not engaged in manual labour.[1]

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[1] *Hindley* v. *Haslam*, 1878, 3 Q.B.D. 481.

[2] *James* v. *Evans & Co.*, [1897] 2 Q.B. 180.

[3] 1878, 5 R. 981.

[4] *Glasgow Tramways and Omnibus Co.* v. *Dempsay*, 1877, 3 Coup. 440.

[5] 43 & 44 Vict. c. 42, s. 8. See para. 1152 *et seq.*, *infra.*

[6] *Ex parte Hughes*, 1854, 23 L.J. M.C. 138.

[7] *Clark* v. *M'Naught*, 1846, Arkley 33.

[8] *Pearce* v. *Lansdowne*, 1893, 62 L.J. Q.B. 441; *Nowlan* v. *Ablett*, 1835, 2 Cr. M. & R. 54; *Nicoll* v. *Greaves*, 1864, 17 C.B. (N.S.) 27.

1135. In a case in which a tramway-car conductor was held to be a labourer, Lord Ormidale said: "He (the servant) may not belong to any of the classes specially enumerated, but I can see no sufficient reason for holding that he does not fall under the general description of persons being servants engaged in manual labour, and I feel myself confirmed in this view by the circumstance that domestic or menial servants are expressly saved or excluded from the operations of the Act, the inference being thereby rendered irresistible, as it appears to me, that all other servants engaged in manual labour are comprehended."[2] While Lord Ormidale's general proposition has been amply confirmed by subsequent decisions, it is doubtful whether a tramway-car conductor has the requisite qualification of being engaged in manual labour. The Queen's Bench Division and the Court of Appeal in England deliberately differed from this decision in a subsequent case, where the workman was employed as the conductor of an omnibus. He was held not to be engaged in manual labour.[3] The same result was arrived at where the duties in question were those of driver of a horse tramcar and of driver of a goods train.[4] It has since been held in Scotland, however, that a vanman delivering furniture is entitled to go to proof on his averment that he is a workman engaged in manual labour,[5] and where a driver of an omnibus could shew that part of his duties as a driver was to repair the omnibus in the event of its breaking down, he was held entitled to the benefit of the Act.[6]

1136. Manual labour means something more than work done with the hands. There must be work with the hands involving labour and muscular effort. One test is whether the manual labour is continuous and requires little application of thought. Such labour must be the servant's real and substantial employment. So a person employed as a stage manager in a theatre, whose principal duty it was to shift furniture and scenes and to do rough stage carpentering, was held to be a person engaged in manual labour.[7] On the other hand, servants in shops belong generally to the excluded class. A grocer's assistant, whose principal duty it was to serve customers over the counter, but who had also to do a certain amount of manual labour, such as bringing up goods from the cellar and carrying parcels out to the van, was held not to be a workman engaged in manual labour.[8] A man with a knowledge of mechanics employed by a firm "to assist them as a practical working mechanic in developing the ideas they, the firm, might wish to carry out, and to himself originate and carry out ideas and inventions suitable to the business of such firm, if such inventions were approved by them," was held not to be a mechanic or workman within the statutory definition.[1]

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[1] *Anderson* v. *J. M. Duncan & Co.* (O.H.), 1906, 14 S.L.T. 575.

[2] *Wilson* v. *Glasgow Tramways and Omnibus Co.*, 1878, 5 R. 981.

[3] *Morgan* v. *London General Omnibus Co.*, 1884, 13 Q.B.D. 832.

[4] *Cook* v. *North Metropolitan Tramways Co.*, 1887, 18 Q.B.D. 683; *Hunt* v. *Great Northern Rly. Co.*, [1891] 1 Q.B. 601.

[5] *Robertson* v. *Thomas's Ltd.* (O.H.), 1907, 15 S.L.T. 32.

[6] *Smith* v. *Associated Omnibus Co.*, [1907] 1 K.B. 916.

[7] *Rushbrook* v. *Grimsby Palace Theatre*, 1909, 100 L.T. 253.

[8] *Bound* v. *Lawrence*, [1892] 1 Q.B. 226.

1137. It was provided by s. 13 that the Act should not apply to seamen or to apprentices to the sea service, but this section was repealed by the Merchant Seamen Act, 1880.[2]

SECTION 3.—CONCILIATION ACT, 1896.

1138. The method of settling disputes by arbitration has been introduced by statute into various departments of the law. Thus the Merchant Shipping Act with regard to apprentices, and the Friendly Societies Act, have clauses by which disputes may be settled in this way, and from an early date statutes have been passed to enable disputes between masters and workmen to be referred to arbitration. Previous to 1896 the three main statutes regulating such a reference were the Masters and Workmen Arbitration Act, 1824,[3] the Councils of Conciliation Act, 1867,[4] and the Arbitration (Masters and Workman) Act, 1872.[5] In 1896 the Conciliation Act [6] was passed, by which the three principal Acts above referred to were repealed and certain provisions enacted in their place. The Board of Trade were given the necessary powers and duties, but in 1916, on the establishment of the Ministry of Labour, the Minister of Labour was invested with the powers and duties of the Board of Trade or of any other Government department or authority relating to labour or industry.[7]

1139. The 1896 Act (as modified by the 1916 Act) sets forth that any board established either before or after the passing of this Act, which is constituted for the purpose of settling disputes between employers and workmen by conciliation or arbitration, or any association or body authorised by an agreement in writing made between employers and workmen to deal with such disputes (in the Act referred to as a conciliation board), may apply to the Minister of Labour for registration under this Act. The remainder of the clause directs that the application to be registered must be accompanied by certain information, that the Ministry must keep a register of conciliation boards and enter therein certain particulars, that each registered conciliation board must send returns, reports, etc., as the Ministry may require, that the Ministry may strike off the name of any conciliation board that has ceased to exist or act, and that, subject to any agreement to the contrary, proceedings for conciliation before a registered conciliation board shall be conducted in accordance with the regulations of the Ministry in that behalf.

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[1] *Jackson* v. *Hill*, 1884, 13 Q.B.D. 618.

[2] 43 & 44 Vict. c. 16.

[3] 5 Geo. IV. c. 96.

[4] 30 & 31 Vict. c. 105.

[5] 35 & 36 Vict. c. 46.

[6] 59 & 60 Vict. c. 30.

[7] New Ministries and Secretaries Act, 1916 (6 & 7 Geo. V. c. 68), s. 2.

1140. Sec. 2 gives the powers of the Ministry as to trade disputes. Where a difference exists or is apprehended between an employer, or any class of employers, and workmen, or between different classes of workmen, the Ministry may, if they think fit, exercise all or any of the following powers, namely: (*a*) Inquire into the causes and circumstances of the difference; (*b*) take such steps as to the Ministry may seem expedient for the purpose of enabling the parties to the difference to meet together, by themselves or their representatives, under the presidency of a chairman appointed as therein described, with a view to the amicable settlement of the difference; (*c*) on the application of employers or workmen interested, and after taking into consideration the existence and adequacy of means available for conciliation in the district or trade, and the circumstances of the case, appoint a person or persons to act as conciliator, or as a board of conciliation; (*d*) on the application of both parties to the difference, appoint an arbitrator (s. 2 (1)). The section goes on to direct that a person appointed to act as a conciliator shall enter into communication with the parties, endeavour to bring about a settlement of the difference, and report to the Ministry (s. 2 (2)); and if a settlement is effected in any of these ways, a memorandum of the terms thereof shall be drawn up and signed by the parties or their representatives, and a copy thereof delivered to and kept by the Ministry (s. 2 (3)). Sec. 3 provides for the exclusion of the Arbitration Act, 1889,[1] which, however, does not apply to Scotland. Sec. 4 gives power to the Ministry to aid in establishing conciliation boards. Sec. 5 provides for the Ministry making a report to Parliament of their proceedings under this Act, and s. 6 provides for the expenses incurred by the Ministry.

SECTION 4.—INDUSTRIAL COURTS ACT, 1919.[2]

1141. The object of this Act is to provide machinery for the settlement of trade disputes. To effect this purpose Industrial Courts are established and provision is made for arbitration. Courts of Inquiry may be set up to investigate the causes and circumstances of any actual or apprehended trade dispute.[3] See TRADE UNION.

SECTION 5.—CONSPIRACY AND PROTECTION OF PROPERTY ACT, 1875.[4]

SUBSECTION (1).—*Trade Disputes.*

1142. This Act changes the common law, by which it was a crime for workmen to enter into a combination for the purpose of compelling an increase of wages, or to compel men to join a trades union. These combinations were held to be criminal because they were in restraint of trade. Sec. 3 provides that an agreement or combination by two or more persons to do, or procure to be done, any act in contemplation or furtherance of a trade dispute shall not be indictable as a conspiracy, if such act committed by one person would not be punishable as a crime. The section does not exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by Act of Parliament, or affect the law relating to riot, unlawful assembly, breach of the peace or sedition, or any offence against the State or the Sovereign. A crime, for the purposes of the section, means an offence punishable on indictment or on summary conviction, and for the commission of which the defender is liable, under the statute making the offence punishable, to be imprisoned, either absolutely or at the discretion of the Court, as an alternative for some other punishment. The section further provides what punishment shall be inflicted where an offence has been committed. This section must be read along with s. 2 of the Trade Union Act, 1871, which declares that "the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to prosecution for conspiracy or otherwise." Accordingly, the result of these two statutes seems to be that no possible combination of workmen can be considered unlawful, unless it has for its object the doing of what would be criminal for one person to do. The ground of criminality, that it is in restraint of trade, has been abolished.

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[1] 52 & 53 Vict. c. 49.

[2] 9 & 10 Geo. V. c. 69.

[3] Slessor and Henderson, Industrial Law, pp. 206 *et seq.*

[4] 38 & 39 Vict. c. 86.

SUBSECTION (2).—*Breach of Contract of Service.*

1143. Sec. 4 of the Act makes it an offence to break a contract of service with anyone who supplies any city, borough, town, or place with gas or water, knowing that the effect of such breach will be to deprive such city, etc., of their supply of gas or water. The punishment of such offence may be a penalty not exceeding £20, or imprisonment not exceeding three months. Sec. 5 makes it an offence, punishable with a like penalty, to commit a breach of a contract of service or of hiring, when the person committing the breach knows that the consequences will be to endanger human life, or cause serious bodily injury, or to expose valuable property, real or personal, to destruction or serious injury. Sec. 6 enacts a penalty of like nature and amount upon a master who is legally liable to provide for his servant or apprentice necessary food, clothing, medical aid, or lodging, and who fails to provide the same.

SUBSECTION (3).—*Intimidation.*

1144. Sec. 7 enacts a penalty for intimidation or annoyance by violence or otherwise.[1] Every person who, with a view to compel any person to abstain from doing, or to do, any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority (1) uses violence to or intimidates such other person, or his wife or children, or injures his property; or (2) persistently follows such other person about from place to place; or (3) hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or (4) watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or (5) follows such other person with two or more other persons in a disorderly manner in or through any street or road; —shall, on conviction thereof by a Court of summary jurisdiction (*i.e.* the Sheriff of the county or his substitutes),[1] or on indictment as thereinafter mentioned, be liable either to pay a penalty not exceeding £20, or to be imprisoned for a term of three months with or without hard labour. This section makes only one offence, the subsections describing the modes of committing it; therefore the subsection does not require to be libelled in the charge.[2] The words "wrongfully and without legal authority" do not require to be inserted in the complaint. They merely furnish the ground of a possible defence.[3]

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[1] *Agnew* v. *Munro*, 1891, 18 R. (J.) 22; 2 White 611; *Stuart* v. *Clarkson*, 1894, 22 R. (J.) 5; 1 Adam 466; *Wilson* v. *Renton*, 1910 S.C. (J.) 32; 6 Adam 166.

SUBSECTION (4).—*Exception of Seamen.*

1145. The Act does not apply to seamen or apprentices to sea service.[4]

SECTION 6.—TRADE DISPUTES ACT, 1906.[5]

SUBSECTION (1).—*Combination in Trade Dispute.*

1146. This Act considerably extends the law as to what it is permissible for workmen to combine to do in contemplation or furtherance of a trade dispute. The 1906 Act freed persons acting in concert in cases of trade disputes from liabilities which might otherwise attach to them at common law.[6] As has been seen, s. 3 of the Conspiracy and Protection of Property Act, 1875, provided that an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute should not be indictable as conspiracy unless such act, if done by one person, were punishable as a crime. Sec. 1 of this Act adds a rider to that section to the effect that no act done under such agreement or combination shall be actionable unless the act, if done without such agreement or combination, would be actionable. This adds civil immunity to that already given in respect of the criminal law.[7]

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[1] 38 & 39 Vict. c. 86, s. 18 (3).

[2] *Stuart* v. *Clarkson*, 1894, 22 R. (J.) 5; 1 Adam 466.

[3] *Stuart* v. *Clarkson*, *supra*; *J. Lyons & Sons* v. *Wilkins*, [1899] 1 Ch. 255.

[4] Sec. 16.

[5] 6 Edw. VII. c. 47.

[6] *Conway* v. *Wade*, [1908] 2 K.B. 844, per Cozens Hardy M.R. at p. 849; Slessor and Henderson, Industrial Law, pp. 146 *et seq.*

[7] *Conway* v. *Wade*, [1909] A.C. 506.

SUBSECTION (2).—*Picketing.*

1147. Sec. 2 provides that it shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works, or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working. This provision takes the place of the saving clause at the close of s. 7 of the Conspiracy and Protection of Property Act, 1875, which is repealed. One result, probably not intended, is that such attending, which under the 1875 Act was exempted from illegality whether there was a trade dispute or not, has now lost that immunity, except where there is a trade dispute imminent or actual. A trade dispute is defined [1] for the purposes of this Act and of the Conspiracy and Protection of Property Act, 1875, as any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person; and the expression "workmen" is declared to mean all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises.

SUBSECTION (3).—*Strikes.*

1148. Sec. 3 provides that an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills. If this section is to be operative as a defence it is necessary that there should be a genuine dispute; "a mere personal quarrel, or grumbling, or agitation will not suffice." Also the act must be genuinely done in contemplation of an imminent dispute, or in furtherance of a dispute already existing. "If, however, some meddler sought to use the trade dispute as a cloak beneath which to interfere with impunity in other people's work or business, a jury would be entirely justified in saying that what he did was done in contemplation or in furtherance, not of the trade dispute but of his own designs, sectarian, political, or purely mischievous, as the case might be." [2]

SUBSECTION (4).—*Prohibition of Actions against Trade Unions.*

1149. Sec. 4 prohibits actions against trade unions in respect of tortious acts committed by or on behalf of them. It does not, however, affect the liability of the trustees of a trade union under s. 9 of the Trades' Union Act, 1871, except in respect of tortious acts committed in contemplation or furtherance of a trade dispute. This section as well as the other sections will be more fully discussed under the heading TRADE UNION.

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[1] Sec. 8.

[2] *Conway* v. *Wade*, [1909] A.C. 506.

SECTION 7.—TRADE DISPUTES AND TRADE UNIONS ACT, 1927.[1]

SUBSECTION (1).—*Illegal Strikes or Lockouts.*

1150. The leading provisions of this Act are designed to prevent the immunities conferred by earlier Acts being enjoyed in the case of lockouts or strikes which are not of a purely industrial character. A lockout or strike is illegal if two elements are present:[2] (1) Some object other than or in addition to the furtherance of a trade dispute within the trade or industry immediately concerned; and (2) that it is designed or calculated to coerce the Government either directly or indirectly or by inflicting hardship on the community. Those acting in furtherance of an illegal strike or lockout are subject to penalties. Protection is given to persons refusing to take part in illegal lockouts or strikes.[3]

SUBSECTION (2).—*Illegal Picketing.*

1151. The Act also deals with intimidation and "picketing." As already explained, the law prior to 1927 was comprised in s. 7 of the Conspiracy and Protection of Property Act, 1875, together with s. 2 (1) of the 1906 Act, which allowed "picketing" on certain terms. But by the 1927 Act such "picketing" becomes unlawful if it is calculated to intimidate any person in any house or place, or to obstruct the approach to or egress from any house or place, or to lead to a breach of the peace.[4] See TRADE UNION.

SECTION 8.—EMPLOYERS' LIABILITY ACT, 1880.[5]

SUBSECTION (1).—*Object of Act.*

1152. The central conception of this Act is to place the workman in the same position with regard to the employer, in certain enumerated circumstances, as would be held by any person not in the employment suffering injury.[6] The workman is to be in the same position as if he were a licensee.[7] In the words of Lord Phillimore, this Act was passed "either to give a right or to take away a defence to a claim of right . . . broadly in two cases—(1) where the fellow-servant of the injured man had been put by the employer into a position of superiority and control over the injured man; and (2) where the injury was due to the failure of the employer to supply a safe and proper place and surroundings in which to work, and safe and proper materials and tools to handle."[1] The Act does not create any new liability on the part of a master, although in certain circumstances it extends an already existing common law liability to a class of persons who were formerly barred from founding on it. At common law the master is liable for the fault of his servant, but it is a complete answer to a pursuer founding thereon, if he be in the same employment, that the fault is that of a fellow-servant, and constitutes one of the risks which he must be held to have contracted to bear. As it was put by Lord Esher: "Before the Act there was this condition in the contract of hiring, that, if there was a defect in the premises or machinery which was open and palpable, whether the servant actually knew it or not, he accepted the employment subject to the risk."[2] What the Act does is in certain circumstances to take away that defence from the master.[3] It does so by providing in s. 1 that in the five cases therein narrated the workman is to be in the same position in respect of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work. That does not constitute a new ground of liability. The ground on which an action under the Act is to be brought is common law liability.[4] The issue taken in actions brought alternatively at common law and under the Act makes no distinction in regard to the ground of liability, but has merely appended to it two schedules of damages;[5] but a workman who at common law would be precluded from founding on that liability by the defence of common employment is placed by the Act in the same position as if he were "a member of the public entering on the defendant's property by his invitation."[6] He may still be met by the defence that the injury which he suffered was the result, not of the negligence of a fellow-servant, but of the ordinary risks of the employment, or that he was working in the face of a known danger which he had consented to incur. These defences are not affected by the Act.

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[1] 17 & 18 Geo. V. c. 22.

[2] Sec. 1 (1).

[3] Sec. 2.

[4] Sec. 3.

[5] 43 & 44 Vict. c. 42.

[6] Beven on Negligence, 4th ed., p. 851.

[7] *Thomas* v. *Quartermaine*, 1887, 18 Q.B.D. 685, per Bowen L.J. at p. 693.

SUBSECTION (2).—*Who are entitled to Benefits of Act?*

1153. Sec. 1 provides that in five specified cases "where after the commencement of this Act personal injury is caused to a workman . . . the workman, or in case the injury results in death the legal personal representatives of the workman and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work." Sec. 8 provides that—"For the purposes of this Act, unless the context otherwise requires, . . . the expression 'workman' means a railway servant, and any person to whom the Employers and Workmen Act, 1875, applies." The first thing which the pursuer who proceeds under this Act has to establish is that the relation of master and servant exists between himself and the defender,[1] and that the person of whose negligence he complains was a fellow-servant. It may not be in the interest of the pursuer to establish such a relationship, as he may have a better remedy at common law.[2] The tests of this relationship will generally be—Who engaged the servant? Who paid him? Under whose instructions did he work? Who had the right of dismissing him? The answers to these questions may in some cases be ambiguous, but will have to be construed with a view to the whole circumstances of the case.[3] Where the contract of service is in question an issue will be allowed bearing "while employed at" instead of "while in the employment of." [4]

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[1] *Connell* v. *James Nimmo & Co.*, 1924 S.C. (H.L.) 84, at p. 94; *cf.* per Lord Young in *Morrison* v. *Baird & Co.*, 1882, 10 R. 278.

[2] *Yarmouth* v. *France*, 1887, 19 Q.B.D. 653.

[3] *M'Laughlan* v. *Colin Dunlop & Co.*, 1882, 20 S.L.R. 271.

[4] *Henderson* v. *John Watson, Ltd.*, 1892, 19 R. 954; *Morrison* v. *Baird & Co.*, 1882, 10 R. 271.

[5] *Goudie* v. *Paul & Sons*, 1894, 22 R. 1; and see *Kane* v. *Stephen & Son*, 1900, 2 F. 739.

[6] *Thomas* v. *Quartermaine*, 1887, 18 Q.B.D. 685.

1154. Where a workman is paid by contractors but is under the instructions of a manager employed by the defenders the Act will apply, and the defence formerly maintainable that the workman and the manager were fellow-servants will not be open.[5] The pursuer, however, must be truly a servant, and not a contractor. A workman, such as a slater, a bricklayer, or a potter's printer, paid by the piece or otherwise, will generally be a workman in the sense of the Act, even though he should himself employ assistants.[6] It is essential that the defenders should have control and superintendence over the person injured. Where this is not so the latter will not be held to be the servant of the defenders, even although the defenders have the power of saying in what part of the work his labour is to be expended, and even though they may be responsible for his wages.[7] In the case of mines the fact that in terms of the Coal Mines Regulation Act [8] the mine-owner has to employ a manager who has a control over all persons in the mine will not *per se* elide the rule that a miner employed by contractors and under their instructions is their servant, and not the servant of the mine-owner. A man will not readily be held to be the servant of two masters at the same time.[9]

1155. It is further necessary that the pursuer should be a workman within the meaning of the Employers and Workmen Act, 1875, or else a railway servant. As has been seen, the Employers and Workmen

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[1] *Nicolson* v. *Macandrew & Co.*, 1888, 15 R. 854.

[2] *Wild* v. *Waygood*, [1892] 1 Q.B. 783.

[3] *Littlejohn* v. *Brown & Co.*, 1909 S.C. 169.

[4] *M'Sorley* v. *Steel Company of Scotland*, 1893, 20 R. 722.

[5] *Morrison* v. *Baird & Co.*, 1882, 10 R. 271; *Walsh* v. *Whiteley*, 1888, 21 Q.B.D. 371; see also *Park & Haggerty* v. *Wilsons & Clyde Coal Co.*, 1929 S.C. (H.L.) 38.

[6] *Stuart* v. *Evans*, 1883, 49 L.T. (N.S.) 138; *Grainger* v. *Aynsley & Co.*, 1880, 6 Q.B.D. 182.

[7] *Robertson* v. *Russell*, 1885, 12 R. 634; *Nicolson* v. *Macandrew & Co.*, *supra*; *Sweeney* v. *Duncan & Co.*, 1892, 19 R. 870; *Littlejohn* v. *Brown & Co.*, *supra*.

[8] 1 & 2 Geo. V. c. 50, s. 2.

[9] *Marrow* v. *Flimby & Broughton Moor Coal Co.*, [1898] 2 Q.B. 588; *Fitzpatrick* v. *Evans & Co.*, [1901] 1 Q.B. 756.

Act, 1875, does not include domestic or menial servants, or persons not engaged in manual labour. The classes of persons whom that exception covers have already been discussed.[1] Railway servants come under the provisions of the Act without restriction as to grade or employment in manual labour. "Railway servant" will probably not include all servants of a railway company but only those employed in operating or work on the railway itself.[2]

1156. Seamen are excluded from the benefits of the Act, as not falling within the term "workman" as limited by the Employers and Workmen Act, 1875. Though by the Merchant Seamen Act, 1880,[3] seamen were brought within the scope of the Employers and Workmen Act, 1875, it was expressly provided that that should be only for the purposes of that Act, and should not affect any provision contained in any other Act, whereby "workman" is defined by reference to persons to whom the Employers and Workmen Act, 1875, applies. The term "seamen" is not defined by the Employers and Workmen Act, 1875. At one time the definition contained in the Merchant Shipping Act of 1894 was accepted in England as applying to the Employers' Liability Act.[4] That decision, however, has been disapproved, and an earlier Scottish decision followed.[5] It has been decided that the term "seaman" must be construed according to its ordinary significance. Thus a person who is only on board a ship for the purpose of doing work in port is not a seaman; a barge or similar vessel not intended for navigation on the sea is not a ship, and a person engaged on such a vessel is not a seaman.[6]

1157. A workman may effectually contract himself out of the benefits of the Act.[7] It has been held that this is not an Act of such a nature that it is intended to protect the workman against himself and that there is nothing contrary to public policy in his contracting himself out of it.[8] He may do so by entering into a contract which comes in lieu of his rights under the Act. A workman was held to have done so where the company had posted notices intimating that deductions would be made from wages to secure insurance benefits in case of accident, and that acceptance of such benefits would discharge all claims under the Act, and where the workman had seen the notice, consented to the deductions, and accepted payments of insurance money.[9]

SUBSECTION (3).—*Cases in which Damages may be recovered under the Act.*

(i) *Defect in Ways, Works, Machinery, or Plant.*

1158. Damages may be recovered where injury is caused to any of the persons above described "by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer."[1] But the workman shall not be entitled to recover unless the defect "arose from or had not been discovered or remedied owing to the negligence of the employer or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition."[2] It will be noticed that here the Act deals not only with the negligence of a superior servant but with the negligence of the master himself. This is not in fact an exception to the rule that the Act creates no new liability in the employer. In so far as it deals with his primary responsibility it is merely declaratory of the common law. In the words of Lord Kingsburgh: "If he superintend the work himself, and if he commits no fault for which he is liable at common law, it is impossible to see how he can be liable under the Employers' Liability Act, which places liability on a master who is not his own superintendent in respect of the fault of a person to whom he has given the superintendence of his work."[3] The negligence which is penalised by the Act is simply the common law negligence. No higher standard of diligence is required either from the master or from the servant whom he has delegated to exercise it than that which was already incumbent upon him where he himself superintended the work.

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[1] See para. 1134 *et seq.*, *supra*.

[2] Wallace, Duty and Liability of Employers, p. 231.

[3] 43 & 44 Vict. c. 16.

[4] *Corbett* v. *Peace*, [1904] 2 K.B. 422.

[5] *Macbeth* v. *Chislett*, [1910] A.C. 220; *Oakes* v. *Monkland Iron Co.*, 1884, 11 R. 579.

[6] Beven, p. 895.

[7] Beven, p. 900.

[8] *Griffiths* v. *Earl of Dudley*, 1882, 9 Q.B.D. 357.

[9] *Wright* v. *Howard, Baker & Co.*, 1893, 21 R. 25; *Clements* v. *London and North-Western Rly. Co.*, [1894] 2 Q.B. 482.

1159. There is no definition in the Act of "ways and works," and the term will always fall to be construed with reference to the circumstances of the particular case under consideration. A way is not necessarily a place definitely marked out or even habitually used as such. The course which a workman would naturally take in going from one part of a place of business to another in connection with his master's work is a way in the sense of the Act;[4] so is a place to which a workman is entitled to go for protection, such as a manhole in a mine.[5] If, however, the workman wander off a well-defined course and cross a place not intended to be used as a way he will be barred from complaining of an injury incurred thereby.[6] It has been held that open joists in a house in the course of construction do not constitute a way, there being nothing that professed to be a road or way at all,[7] and the Court refused to entertain the argument that the place where a man stood in order to work a machine, and which was said to have become slippery, was a way in the sense of the Act.[8]

1160. The defect must really be a defect in the way itself or in its condition. In the case of *Connell* v. *James Nimmo & Co.*,[9] the leading authorities were considered in the House of Lords. In that case it was held that a dangerous accumulation of explosive gas in the workings of a mine serving as air conduits as well as ways or roads, which was not detected owing to the failure of an official to make the statutory inspection, was a defect in the condition of the ways and works. Doubt was cast on some earlier decisions which drew a distinction between material and physical defects in the structure or substance of the way itself, and defects in the condition of the way arising from negligent use or from the presence in the way of something independent of its structure or substance. Accordingly the decisions in *Willetts* v. *Watt & Co.*,[1] where a hole caused by the temporary removal of a lid covering it, was held not to be a defect in the way, and in *M'Giffin* v. *Palmer's Shipbuilding and Iron Co.*,[2] where a tap temporarily left projecting into the way was held not to be a defect in the way, were disapproved. The true principle appears to be that stated in *Walsh* v. *Whiteley*,[3] as approved by Lord Atkinson in *Connell* v. *James Nimmo & Co.*:[4] "It must be a defect in the original construction or subsequent condition . . . rendering it unfit for the purposes to which it is applied when used with reasonable care and caution, and a defect arising from the negligence of the employer." An insufficiently covered depression in the surface, an insecurely propped roof of a roadway in a mine, and an obstructed access to a manhole were held to have grounded claims under the Act.[5] But every dangerous way is not defective in the sense of the Act. Where a way is dangerous, not through the negligence of the employer, or where a dangerous way is taken in preference to a safe one, no action will lie.[6]

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[1] Sec. 1 (1).

[2] Sec. 2 (1).

[3] *Bruce* v. *Barclay*, 1890, 17 R. 811.

[4] *Willetts* v. *Watt & Co.*, [1892] 2 Q.B. 92.

[5] *Ferris* v. *Cowdenbeath Coal Co.*, 1897, 24 R. 615.

[6] *M'Shane* v. *Baxter*, 1890, 7 T.L.R. 58.

[7] *M'Gowan* v. *Smith*, 1907 S.C. 548.

[8] *Hosie* v. *Fred. M. Walker, Ltd.*, 1907 S.C. 134.

[9] 1924 S.C. (H.L.) 84.

1161. Machinery and plant, not being terms defined in the Act, receive a wide construction. "Machinery" is not a term which admits of much doubt as to its meaning, but the kind of defect therein which renders an employer liable requires definition. "It must be a defect in the condition of the machine, having regard to the use to which it is to be applied or the mode in which it is to be used. It may be a defect either in the original construction of the machine or a defect arising from its not being kept up to the mark, but it is essential that there should be evidence of negligence of the employer or some person in his service entrusted with the duty of seeing that the machine is in proper condition. It must be a defect in the original construction or subsequent condition of the machine rendering it unfit for the purposes to which it is applied when used with reasonable care and caution. . . . It was not intended to relieve workmen from the exercise of that care and caution without which most machinery is dangerous. . . . The Act is not directed against dangerous machines but against the negligence of employers." [7] Thus where a machine, apparently suitable for its purpose, broke down owing to some flaw the existence of which the defenders could not have been expected to suspect, they were held not liable.[1] The fact that a machine perfectly suited for its purpose and of sound construction is not sufficiently guarded may constitute a defect within the meaning of the Act. Where such a defect is obvious, negligence on the part of the employer or the servant responsible for the condition of the machine will be presumed.[2] Though a machine be of perfectly sound construction and in good condition, if it be unsuitable for the purpose to which it is put it is defective in the sense of the Act. In the words of Brett M.R.: "It comes to this, that although each part might be sufficient, yet if the whole arrangement was defective for the purpose for which it was applied there would be a defect so as to bring it within the Act." [3] Illustrations are furnished by the cases of a lift not fenced so as to protect the workmen from falling coke, and a ladder not provided with hooks or stays to grip a pipe against which it had to be rested.[4] It may also be a defect in the sense of the Act where a machine usually perfect is rendered temporarily insufficient from passing neglect.[5]

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[1] [1892] 2 Q.B. 92.

[2] 1882, 10 Q.B.D. 5.

[3] 1888, 21 Q.B.D. 371, at p. 378.

[4] 1924 S.C. (H.L.) 84, at p. 91.

[5] *Bowie* v. *Rankin & Co.*, 1886, 13 R. 981; *M'Mullen* v. *Newhouse Coal Co.*, 1896, 23 R. 759; *Woods* v. *Carron Iron Co.*, 1892, 8 T.L.R. 376; *Ferris* v. *Cowdenbeath Coal Co.*, *supra*.

[6] *Pritchard* v. *Lang*, 1889, 5 T.L.R. 639; *Forsyth* v. *Ramage & Ferguson*, 1890, 18 R. 21.

[7] *Walsh* v. *Whiteley*, 1888, 21 Q.B.D. 371.

1162. "There is no definition of plant in the Act, but, in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business—not his stock in trade which he buys or makes for sale, but all goods and chattels, fixed or moveable, alive or dead, which he keeps for permanent employment in his business"; [6] so a horse is plant in the sense of the Act.[7] It is to be observed, however, that an insufficient stock of a particular kind of plant will not constitute a defect in the sense of the Act.[8]

1163. The defect must be in the condition of the ways, etc., "connected with or used in the business of the employer." [9] The ways must be the ways used in the business. Accordingly, works in the course of construction, such as an unfinished wall and machinery brought into the place of business but not made ready for use, are not covered by the statute.[10] But an article does not require to be the property of the employer to fall within the subsection. The master will be liable for injuries caused by a defect in plant used by him in his business, but supplied by the person for whom he is working. If he uses plant so supplied without inspection or inquiry there is a *prima facie* case of negligence,[11] but where a bricklayer's labourer was injured through the giving way of a stair built by another tradesman in an unfinished house the Act was held not to apply.[12]

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[1] *Seeley* v. *Jackson & Sons*, 1882, 20 S.L.R. 11; *Milne* v. *Townsend*, 1892, 19 R. 830.

[2] *Morgan* v. *Hutchins*, 1890, 59 L.J. Q.B. 197.

[3] *Cripps* v. *Judge*, 1884, 13 Q.B.D. 583.

[4] *Heske* v. *Samuelson & Co.*, 1883, 12 Q.B.D. 30; *Weblin* v. *Ballard*, 1886, 17 Q.B.D. 122; *Johnson* v. *Mitchell & Co.*, 1885, 22 S.L.R. 698.

[5] *Tate* v. *Latham & Son*, [1897] 1 Q.B. 502; *Thomson* v. *Scott & Co.*, 1897, 25 R. 54.

[6] *Yarmouth* v. *France*, 1887, 19 Q.B.D. 647.

[7] *Haston* v. *Edinburgh Street Tramways Co.*, 1887, 14 R. 621; cf. *Fraser* v. *Hood*, 1887, 15 R. 178.

[8] *Hosie* v. *Fred. M. Walker, Ltd.*, 1907 S.C. 134.

[9] Beven, p. 861.

[10] *Howe* v. *Finch*, 1885, 17 Q.B.D. 187.

[11] *Biddle* v. *Hart*, 1907, 76 L.J. K.B. 418.

[12] *M'Inulty* v. *Primrose*, 1897, 24 R. 442.

(ii) *Negligence of Person entrusted with Superintendence.*

1164. Damages may be recovered where the injury is caused "by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence."[1] A person who has superintendence entrusted to him is defined[2] as "a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour." It has been decided that these provisions do not apply where an employer is himself exercising superintendence.[3] In order to make a relevant case it is necessary to aver specifically the duties of the person alleged to be in a position of superintendence, but if these averments go to shew that he is truly a superintendent it is not necessary to aver that he is not ordinarily engaged in manual labour.[4] A man who has ordinarily to work with his hands while at the same time having the duty of giving instructions to others does not exercise superintendence within the meaning of this subsection; so a foreman of a gang of stevedores, who was himself a labourer but who had the duty of giving the signal for lowering bales into the hold, was held not to be a person in superintendence, and his negligent dropping of a bale was not an act in the exercise of superintendence.[5] It is always necessary that the negligence should occur while the person entrusted with superintendence is in the course of exercising it. Should he have ceased to do so for an appreciable length of time and be engaged in manual labour, the question whether the negligent act was done by him in the capacity of a superintendent or in the capacity of a labourer will be a question for the jury.[6] The fact that a superintendent voluntarily and temporarily engages in manual labour will not ordinarily deprive him of his character as a superintendent, nor is it necessary that at the time of his negligent act he should be exercising actual superintendence over the workman injured.[7]

1165. It has been held that this subsection does not free the workman from his ordinary duty of taking care of himself, and that the plea of contributory negligence remains open to the employer.[8]

(iii) *Negligence of Person to whose Orders the Servant has to conform.*

1166. Damages may be recovered where the injury occurs "by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed."[9] The provision operates where the relative position of the parties is such that the one owed obedience to the other, and that the order is such that it cannot be declined without contumacy.[1] The question whether a person giving orders was a person in this position, whom to disobey would be contumacy, is always a question of fact.[2] The grade in the employment occupied by the person giving orders is relevant but not decisive. If he is the only person there who could give orders that will be an important element.[3] In a case of emergency it will generally be presumed that a servant in a position of responsibility is entitled to issue orders and exact obedience from inferior workmen.[4] The fact that a person who has the right to issue orders is himself under the directions of a general foreman or superintendent, and can only enforce his orders by an appeal to him, will not deprive him of his character under this subsection.[5]

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[1] Sec. 1 (2).
[2] Sec. 8.
[3] *Bruce* v. *Barclay*, 1890, 17 R. 811.
[4] *Moore* v. *Ross*, 1890, 17 R. 796; *MacLeod* v. *Pirie*, 1893, 20 R. 381.
[5] *Kellard* v. *Rooke*, 1887, 21 Q.B.D. 367.
[6] *Donelly* v. *Spencer & Co.*, 1899, 1 F. 1107.
[7] *Osborne* v. *Jackson*, 1883, 11 Q.B.D. 619.
[8] *Wilson* v. *Caledonian Rly. Co.*, 1899, 2 F. 319.
[9] Sec. 1 (3).

1167. The orders given must be given within working hours, and within the scope of the authority of the person giving them.[6] This does not mean that if the order is an improper one the inferior servant will be barred from proceeding under this subsection, but the order must not be plainly *ultra vires* or illegal.[7] But if the circumstances are doubtful, and the workman cannot be shewn to have known that the order which he obeyed was outwith the scope of the authority of the person giving it, he will be given the benefit of the doubt.[8] The orders given must be explicit, but it does not appear essential to the relevancy of an action that a specific order should be averred.[9] Mere non-interference by a superior servant will not be sufficient to bring the case under this subsection. The orders must be particular, not general merely. A mere instruction to a workman to work at a particular job, without telling him where he was to stand, in a case where he was not under any direct supervision while doing the job, was not held sufficient to entitle him to found on a negligent act, causing him injury, by the person who had given him his instructions.[6]

1168. There must be an intimate connection between the order given and the ensuing injury. The order must be the cause, though not necessarily the proximate cause. It need not be the *causa causans*, but must be a *causa sine qua non*.[10] The difference between the preceding subsection and this one is that in the former it was sufficient if the negligence occurred while the superintendent was in the exercise of superintendence, and the injury resulted from the negligence. Here it is further necessary that the injury should actually result from the fact of the workman conforming to an order given by a person with authority to give it.

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[1] *Dolan* v. *Anderson & Lyell*, 1885, 12 R. 804; *M'Manus* v. *Hay*, 1882, 9 R. 429.

[2] *Flynn* v. *M'Gaw*, 1891, 18 R. 554.

[3] *Wild* v. *Waygood*, [1892] 1 Q.B. 783.

[4] *Grant* v. *William Baird & Co.*, 1903, 5 F. 459.

[5] *Dolan* v. *Anderson & Lyell*, *supra*.

[6] *Snowden* v. *Baynes*, 1890, 25 Q.B.D. 193.

[7] *Bunker* v. *Midland Rly. Co.*, 1882, 47 L.J. Q.B. 476.

[8] *Sweeney* v. *M'Gilvray*, 1886, 14 R. 105.

[9] *M'Call* v. *Black & Eadie*, 1891, 18 R. 507; *Flynn* v. *M'Gaw*, *supra*; *Millward* v. *Midland Rly. Co.*, 1884, 14 Q.B.D. 68.

[10] *Wild* v. *Waygood*, *supra*; *Canavan* v. *John Green & Co.*, 1905, 8 F. 275.

(iv) *Obedience to Defective Rules.*

1169. Damages may be recovered where injury occurs "by reason of the act or omission of any person in the service of the employer, done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf." [1] But the workman shall not recover "unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein mentioned; provided that where a rule or by-law has been approved, or has been accepted as a proper rule or by-law, by one of Her Majesty's principal Secretaries of State, or by the Board of Trade, or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed for the purposes of this Act to be an improper or defective rule or by-law." [2] In so far as this section deals with the negligence of the master himself in framing his rules it merely affirms his common law liability. But the section works a change in the law by providing that where anything is done under a rule or by-law regulating an establishment, the natural result of which is to work injury to a workman, the employer is liable. The same principle applies where, under a rule or by-law, some act is omitted which would otherwise have been done, and injury is caused.[3] Where it is difficult to say whether the act which caused the injury was done in obedience to the rules or was a spontaneous act the Court will not strain the meaning of a rule, but will regard it so far as possible as "a reasonable order, given by a reasonable master to a reasonable man, and therefore to be interpreted in a reasonable manner." Where a man is bound by the rules to do a certain thing, but does it at an improper moment and in an improper way, a resulting injury will not be regarded as caused by his obedience to the rules.[4]

(v) *Negligence of Railwaymen.*

1170. Damages may be recovered where the injury occurs "by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway." [5] The term "railway" does not mean merely railways belonging to companies subject to the Railway Regulation Acts, but includes a temporary railway laid down by a contractor for the purposes of construction of works, a railway in a colliery, and, in fact, any way upon which trains pass by means of rails.[6] The word "train" has been held to include trucks coupled together, but without a locomotive, and set in motion by a capstan worked by a stationary hydraulic crane. Waggons detached from the engine in the course of shunting have been held to remain part of a train, but a steam-crane fixed on a trolley and propelled by steam on a set of rails is not a train.[1] A person having charge or control of a train is not necessarily a person having charge of the whole train,[2] but he must be really in charge, and not merely working under the orders of another.[3]

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[1] Sec. 1 (4).
[2] Sec. 2 (2).
[3] Beven, p. 880.
[4] *Whatley* v. *Holloway*, 1890, 6 T.L.R. 353.
[5] Sec. 1 (5).
[6] *Doughty* v. *Firbank*, 1883, 10 Q.B.D. 358.

SUBSECTION (4).—*Failure by Workman to give notice of Defect or Negligence.*

1171. Sec. 2, subs. (3), provides that "in any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence," the workman shall not be entitled to recover. Under this subsection the employer may prove by way of defence that the workman who has been injured, knowing of the defect which caused his injury, failed to communicate the information which would have enabled the employer to prevent the accident. Even when the workman has given notice of the defect the employer may plead that by continuing to work in the face of it the workman accepted the risk and is therefore barred from recovering. This is not a defence which will probably be sustained unless the proof be very clear. The workman must both know of and fully appreciate the danger. The maxim has been said to be not *scienti non fit injuria*, but *volenti*.[4] The defect may be of so obvious a character that an employer or his superior servant will be presumed to know of it, and the workman will be entitled to recover even though he failed to give notice. Thus in one case it was held that the superior servants of an employer must have known of the untrustworthy condition of a horse.[5]

SUBSECTION (5).—*Amount of Compensation recoverable.*

1172. The amount of compensation recoverable under the Act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury.[6] Any penalty which may have been paid to the workman or his representatives in pursuance of any other Act of Parliament is to be deducted from the compensation awarded under the Act.[7] It is to be observed that s. 3 prescribes, not a measure of damages, but a limit. Anything up to or within that limit will be a good award. The limit is the amount of three years' wages at the rate the injured person was earning at the time of the accident. The probability of a future increase of wages, as in the case of an apprentice whose apprenticeship is nearly completed, cannot be taken into account. Food or clothing furnished in addition to wages may be taken into account, but adventitious tuition cannot be. If the actual wages earned during the three years prior to the injury were less than the multiple for three years of the wages earned at the time of the injury it is possible, though it has not been decided, that the lower figure may represent the limit within which compensation may be awarded.[1]

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[1] *Cox* v. *Great Western Rly. Co.*, 1882, 9 Q.B.D. 106; *M'Cord* v. *Cammell & Co.*, [1896] A.C. 57; *Murphy* v. *Wilson*, 1883, 52 L.J. Q.B. 524.

[2] *M'Cord* v. *Cammell & Co.*, *supra.*

[3] *Gibbs* v. *Great Western Rly. Co.*, 1884, 12 Q.B.D. 208.

[4] *Yarmouth* v. *France*, 1887, 19 Q.B.D. 647; *Thomas* v. *Quartermaine*, 1887, 18 Q.B.D. 685; *Smith* v. *Cooke*, [1891] A.C. 325.

[5] *Haston* v. *Edinburgh Street Tramways Co.*, 1887, 14 R. 621.

[6] Sec. 3.

[7] Sec. 5.

Subsection (6).—*Notice of the Injury.*

1173. Notice of the injury must be given within six weeks of the accident, and the action commenced within six months, or in the case of death within twelve months, of the accident; "provided always that in the case of death the want of notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice." [2] The notice must give the name and address of the person injured, and state in ordinary language the cause of the injury and the date at which it was sustained, and must be served on the employer, or, if there is more than one employer, upon one of such employers. It may be served by delivering it at the residence or place of business of the person on whom it is to be served, or by post by a registered letter addressed to such person at his last known residence or place of business. When service is by post the notice shall be deemed to have been served at the time when the letter containing it would have been delivered in the ordinary course of the post, and proof that the notice was properly addressed and registered shall be proof of service. Where the employer is a body of persons, corporate or unincorporate, service shall be by delivery at, or by posting in a registered letter to, the office, or, if there be more than one office, any one of the offices of such body. Further, "a notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading." [3]

1174. The notice must be a written and not merely oral notice.[4] The written notice must also contain the particulars required by the statute. Even where the particulars had been supplied orally and taken down in writing by the employer's superintendent, but the written notice merely referred to an accident, "particulars of which have already been communicated to your superintendent," it was held that there was not notice within the meaning of the statute.[5] The time limit of six weeks for giving notice and of six months for raising the action cannot be extended by the Court except in case of death, as provided by the Act.[1] The rule was applied even in a case where the solicitor who had given the notice died, and his successor, not knowing that notice had been timeously given, raised an action at common law. Though this action had been raised within the six months it was held incompetent to amend the record after the six months had expired, so as to bring the action within the statute.[2] Where the person injured was *non valens agere* as the result of the accident, it was held that the strict terms of the Act must be enforced.[3] Even where the injury has resulted in death the Court will be strict in deciding what constitutes a reasonable excuse. Thus where the relative is the pursuer it is not sufficient to aver that there was delay in order to see what was to be the termination of the injury; nor will matters which might be predicated of any pursuer, such as old age or grief caused by the death, be treated as reasonable excuses within the meaning of the Act.[4]

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[1] *Noel* v. *Redruth Foundry Co.*, [1896] 1 Q.B. 453.

[2] Sec. 4.

[3] Sec. 7.

[4] *Moyle* v. *Jenkins*, 1881, 8 Q.B.D. 116.

[5] *Keen* v. *Millwall Dock Co.*, 1882, 8 Q.B.D. 482.

1175. As to the form of the notice, on the other hand, great latitude has been allowed by the Courts. Even where the cause of injury or the date of the injury is omitted the notice has been held good.[5] But the notice must be for the purposes of the Act. A notice given and bearing to be for a remedy under the Workmen's Compensation Act was held not to be a notice for the purposes of this Act.[6] Whether the defender has been prejudiced in his defence and the intention of the notice was to mislead is a question for the Court which may be decided either at the proof or before allowing one.[7] The decision of the judge of first instance on this point will not generally be interfered with unless it is apparent that he has not applied his mind to the question.[8]

1176. If the notice be given by registered letter, properly addressed and registered, there is presumptive proof of service which can only be displaced by direct proof that the letter never reached the defender. If the letter be not registered the presumption is absent, but delivery may be proved. Where the letter was wrongly addressed the notice was held to be good on the defender's admission that he had received it.[9] Where notice was denied but there was also a case at common law, the question of notice was reserved for the judge at the trial.[10] It has been held that a notice delivered to a head official of a limited company at one of its offices was a good notice.[11]

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[1] *M'Donagh* v. *P. & W. MacLellan*, 1886, 13 R. 1000.

[2] *Clark* v. *Adams*, 1885, 12 R. 1092.

[3] *Johnson* v. *Shaw* (O.H.), 1883, 21 S.L.R. 246.

[4] *MacFayden* v. *Dalmellington Iron Co.*, 1897, 24 R. 327; *Connolly* v. *Young's Paraffin Oil Co.*, 1894, 22 R. 80.

[5] *Thomson* v. *Robertson & Co.*, 1884, 12 R. 121; *Carter* v. *Drysdale*, 1883, 12 Q.B.D. 91; *Stone* v. *Hyde*, 1882, 9 Q.B.D. 76.

[6] *Thomson* v. *Baird & Co.*, 1903, 6 F. 142.

[7] *Trail* v. *Kelman & Co.*, 1887, 15 R. 4.

[8] *Thomson* v. *Robertson & Co.*, *supra*; *Stone* v. *Hyde*, *supra*.

[9] *MacGovan* v. *Tancred, Arrol & Co.*, 1886, 13 R. 1033.

[10] *M'Leod* v. *Pirie*, 1893, 20 R. 381.

[11] *Duncan* v. *Fife Coal Co.*, 1905, 7 F. 958.

Subsection (7).—*Actions must originate in Sheriff Court.*[1]

1177. Every action for recovery of compensation under the Act shall be brought in a County Court,[2] which, with respect to Scotland, means the Sheriff Court. This applies also where there is an alternative conclusion at common law. It is to be noted that if an action be brought alternatively under this Act and at common law it is desirable that the two grounds of liability, if there be two, should be clearly distinguished; but if the only difference between the claims, except in the amount of damages, be that a defence which is maintainable at common law is not maintainable under this Act, the action will not be held irrelevant because of failure to distinguish the two claims in the pleadings.[3]

1178. Under the same subsection it was provided that such actions might be removed to the Court of Session in the ordinary way. This, however, was altered by the Workmen's Compensation Act, 1906, s. 14, which did away with appeal except on questions of law in all actions by workmen under the Employers' Liability Act. The provisions of that Act were in their turn superseded by the Sheriff Courts (Scotland) Act, 1907,[4] s. 31 of which provided as follows: "In any action raised in the Sheriff Court by an employee against his employer, concluding for damages under the Employers' Liability Act, 1880, or alternatively under that Act or at common law, in respect of injury caused by accident arising out of and in the course of his employment, where the claim exceeds fifty pounds, either party may, so soon as proof has been allowed, or within six days thereafter, require that the cause shall be tried before a jury, in which case the Sheriff shall appoint the cause to be tried before a jury of seven persons." The interlocutor applying the verdict is to be appealable only on the following grounds: (1) That the verdict has been erroneously applied; (2) that it is contrary to the evidence; (3) that evidence has been unduly refused or admitted, or that the Sheriff has misdirected the jury; and (4) that the damages are inadequate or excessive. The rules of procedure in such a trial are fully set forth in that Act, but have proved so cumbrous that this form of procedure is not widely resorted to.

1179. Sec. 30 of the Sheriff Courts Act, 1907, provides that "In cases originating in the Sheriff Court (other than claims by employees against employers in respect of injury caused by accident arising out of and in the course of their employment, and concluding for damages under the Employers' Liability Act, 1880, or alternatively at common law or under the Employers' Liability Act, 1880), where the claim is in amount or value above fifty pounds, and an order has been pronounced allowing proof, . . . it shall, within six days thereafter, be competent to either of the parties who may conceive that the cause ought to be tried by jury to require the cause to be remitted to the Court of Session for that purpose, where it shall be so tried. . . ." Powers are given to the Court of Session, if so advised, to remit the case back to the Sheriff or do otherwise as they see fit.

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[1] Lewis, Sheriff Court Practice, pp. 48 *et seq.*

[2] Sec. 6 (1).

[3] *Campbell* v. *United Collieries, Ltd.*, 1912 S.C. 182; *M'Grath* v. *Glasgow Coal Co.*, 1909 S.C. 1250.

[4] 7 Edw. VII. c. 51.

1180. It will be observed that s. 31 of the Sheriff Courts Act, 1907, deals with an action raised by an employee against his employer, and makes no reference to cases in which, owing to the death of the employee, other persons have become entitled to sue under the Employers' Liability Act. Similarly in clause 30 of the Sheriff Courts Act, 1907, though it is provided that claims brought by the employee shall not be appealable for jury trial, there is no such exclusion in the case of other persons entitled to sue through his death. It has been held that even though this is probably due to inadvertent draftsmanship the Courts are bound by the result. In consequence, though the workman has lost his right to appeal to the Court of Session for jury trial, and has got instead the right to have his case tried by a jury in the Sheriff Court, persons suing in respect of his death may still have the cause removed to the Court of Session in cases where the claim is for an amount exceeding £50.[1]

SUBSECTION (8).—*Duration of Act.*

1181. The Act was originally passed for the seven years commencing 1st January 1881. It was continued under the Expiring Laws Continuance Acts, but was ultimately made permanent by the Expiring Laws Act, 1922.[2]

SECTION 9.—THE WORKMEN'S COMPENSATION ACTS.

See WORKMEN'S COMPENSATION.

SECTION 10.—THE TRUCK ACTS.

SUBSECTION (1).—*Object of Acts.*

1182. These Acts have for their object the abolition of a system of payment of wages in goods, or otherwise than in money, which largely prevailed in the eighteenth century and early in the nineteenth century, especially in mining and manufacturing districts. The name "truck" implies a process of barter or exchange, and may possibly have the same origin as the word "traffic":[3] the system was, practically, the exchange of labour for goods. The system has been thus described: "The plan has been for the masters to establish warehouses or shops, and the workmen in their employment have either got their wages accounted for to them by supplies of goods from such depots, without receiving any money, or they have got the money with an express understanding that they were to resort to the warehouses or shops of their masters for the articles of which they stood in need." [1] It is obvious that workmen would thus be exposed, as in fact they were, to receiving goods either inferior in quality or overestimated as to value —owing to the master's contractual monopoly—and to the risk of being compelled or induced to take goods beyond their need or ability, and so of falling under a master's power. On such grounds legislative restrictions were enacted, to correct the mischief arising from the unfair disadvantage involved in the practice, and to secure, so far, that the person employed should obtain the stipulated remuneration for services rendered.[2]

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[1] *Lawrie* v. *Banknock Coal Co., Ltd.*, 1912 S.C. (H.L.) 20.

[2] 12 & 13 Geo. V. c. 50.

[3] *Cp.* the Scottish word "troke," and see Skeat's Etymological Dictionary of the English Language, "truck," "traffic."

1183. There are now three statutes dealing exclusively with this practice, namely, of 1831,[3] of 1887,[4] and of 1896.[5] The Act of 1887 extends and amends that of 1831, and the Act of 1896 enacts further amendments: the three are now read together as "The Truck Acts, 1831 to 1896." [6] The Act of 1831 was a consolidating Act, following on the repeal [7] in detail of previous particular enactments—from the time of Edward IV. onwards—of like character.

SUBSECTION (2).—*Wages to be paid in Money.*

1184. In contracts of hire between an employer and a workman the whole wages of a workman where services are hired must, with certain exceptions, be paid to him in coin, and it is illegal to make payment in goods or kind.[8] Payment (in part) of wages by orders for goods on a shop or store was held to be a contravention of s. 3 of the 1831 Act, even although the employer had no interest in the shop or store.[9] The workmen protected by the provisions of the Truck Acts are such as fall within the definition of the term "workman" in the Employers and Workmen Act, 1875.[10] The contracts [11] of hire to which the Acts are applicable comprise practically all possible hiring of workmen's services. A contract which provides for wages being paid otherwise than in coin is illegal,[12] except in the case of agricultural workers who may receive food, drink (not being intoxicating), a cottage, or other allowance in addition to wages in cash.[13] Wages in so far as not paid in money may be recovered by action on the workman's part.[14]

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[1] Tomlins, Law Dictionary, "Truck System."

[2] Baron Bramwell in *Archer* v. *James*, 1862, 2 B. & S. 89; *Hewlett* v. *Allan*, [1894] A.C. 383, per Lord Herschell at p. 389; see Slessor and Henderson, Industrial Law, pp. 188 *et seq.*; Bell's Prin., ss. 36 (8), 192 (2).

[3] 1 & 2 Will. IV. c. 37.

[4] 50 & 51 Vict. c. 46.

[5] 59 & 60 Vict. c. 44.

[6] Sec. 12 of the Act of 1896.

[7] By 1 & 2 Will. IV. c. 36.

[8] 1831 Act, s. 3; *Redgrave* v. *Kelly*, 1889, 37 W.R. 543; *Williams* v. *North's Navigation Collieries*, [1906] A.C. 136.

[9] *Finlayson* v. *Braidbar Quarry Co.*, 1864, 2 M. 1297.

[10] 38 & 39 Vict. c. 90, s. 10; 1887 Act, s. 17; see para. 1134 *et seq.*

[11] 1831 Act, s. 25, defines the term "Contract."

[12] 1831 Act, s. 1.

[13] 1887 Act, s. 4.

[14] 1831 Act, s. 4.

1185. Where the workman brings an action to recover wages, no set-off or deduction is permissible for goods supplied by the employer or by any shop in which the employer has an interest,[1] or for goods supplied to the workman by any person under the order of the employer or his agent.[2] Accordingly it is illegal to pay wages less a deduction for goods previously purchased from the employer, and the workman is entitled to take proceedings to recover the deduction.[3] The proceedings must be brought within six months, and where there has been consent or acquiescence, only any excess over what the Court may find to be fair or reasonable may be recovered.[2] An employer is not entitled to deduct anything in respect of shares in the employer's company bought by the workman and unpaid for.[4]

1186. All contracts containing stipulations as to the place where or the manner in which wages are to be expended are illegal.[5] In *John Gray & Co.* v. *M'Kenna* [6] the question was raised whether under s. 6 of the 1887 Act a condition imposed on employees that they should not spend wages at a certain store (a co-operative store) was illegal. The Sheriff-Substitute held that it was. On appeal, the High Court held the charge irrelevant from want of sufficient specification of the party charged and of the contravention, so that the question on the merits was not determined.

1187. The Acts apply also in the case of persons making articles in their own homes, provided only members of the family are so employed, and that the articles are in value under £5 and made of certain specified materials. All such persons fall to be regarded as workmen, and the dealer buying the articles so made as an employer.[7]

Subsection (3).—*Deductions allowable by the Acts.*

1188. Certain deductions are allowed by the Acts. Where an employer has supplied, or contracted to supply to a workman, medicine or medical attendance, materials, tools, or other implements (if the workman be employed in mining), fuel, provender for beasts of burden used in business, or rent, he is entitled to make a deduction in respect thereof provided the deduction does not exceed the full value of the things supplied, and provided the contract is in writing and signed by the workman.[8] The written contract need not specify the amounts to be deducted,[9] but the deductions are illegal unless there be a written agreement signed by the workman.[10] An employer stopped part of a workman's wages in payment of coals supplied by him to the workman. The employer also, as factor for the landlord of the house occupied by the workman, collected the workman's rent by deducting it from his wages. The amount so deducted he handed over to the landlord less a small commission which he retained. The employer had no written authority from the workman to make these deductions. It was held that the workman was entitled to recover the deductions made in respect of coals, but not the deductions made for rent, as the employer in paying the sum so deducted had acted as the workman's agent.[1]

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[1] 1831 Act, s. 5.

[2] 1887 Act, s. 5.

[3] *Wilson* v. *Cookson*, 1863, 32 L.J. M.C. 177; *Hughes* v. *Bonella*, 1894, 16 T.L.R. 197; *M'Lucas* v. *Campbell*, 1892 (O.H.), 30 S.L.R. 226.

[4] *Redgrave* v. *Kelly*, 1889, 37 W.R. 543.

[5] 1831 Act, s. 2; 1887 Act, s. 6.

[6] 1889, 6 S.L.T. 456.

[7] 1887 Act, s. 10.

[8] 1831 Act, s. 23; *Williams* v. *North's Navigation Collieries*, [1906] A.C. 136; *Summerlee Iron Co.* v. *Thomson*, 1913 S.C. (J.) 34; *M'Lucas* v. *Campbell*, *supra*.

[9] *Cutts* v. *Ward*, 1867, L.R. 2 Q.B. 357.

[10] *Pillar* v. *Llynoi Coal and Iron Co.*, 1869, L.R. 4 C.P. 752; *M'Lucas* v. *Campbell*, *supra*.

1189. Employers making contracts under the Acts must produce them, on written demand, to any inspector of factories or of mines, and give a copy to the contracting workman or shop assistant at the time of making, and also on demand; and the employer must keep a register of deductions or payments for fines purporting to be made under such contract, which shall be open to the inspector, all under a penalty of forty shillings.[2] Contracts under the Acts are not liable to stamp duty.[3] The Secretary of State has power to exempt from the operation of these provisions, but Parliament may annul the order.[4]

1190. In *Hynd* v. *Spowart & Co.*,[5] Lord M'Laren held that a pay-ticket, signed on receipt of wages, which bore that deductions were to be made for doctor, smith, fire, coal, water, and house rent, was not an agreement or contract in writing for the relative actual stoppage or deductions as required by s. 23 of the 1831 Act. "In my opinion," he said, "receipts for the wages of past services are not the kind of agreement in writing which the statute prescribes. I think that either the agreement must apply to the particular fortnightly payment, or it must be a prospective and continuous agreement." A signed pay-ticket bearing the following terms, "Received payment of £ , and I hereby authorise you to deduct from my wages in future, so long as I am in your employment, the amount of my house rent," was held not to be a written agreement justifying under s. 23 a deduction for rent for a period subsequent to the period of employment.[6] In the same case it was also held that a regulation of the employment which in effect stipulated for right to deduct for non-removal from houses on the expiry of the employment was not a contract as to rent within the meaning of s. 23, but was a contravention of s. 2. A company let to its employees houses for the period of their employment, and at each fortnightly pay-day the employees signed receipts for their wages, which contained a clause authorising the deduction of the house rent from their future wages, and also the following clause: "In the event of my leaving your employment I authorise you to retain whatever moneys are in your hands until I remove from your house." The employees left the employment owing to a strike, and from the wages payable to them the company, in virtue of the authority contained in the receipts signed on the preceding pay-day, withheld from each employee a sum as against what might become due in respect of the occupation of his house. It was held that the contract contained in the receipts and the retention of wages were struck at by the 1831 Act.[1]

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[1] *M'Lucas* v. *Campbell*, 1892 (O.H.), 30 S.L.R. 226.

[2] 1896 Act, s. 6.

[3] *Ibid.*, s. 7.

[4] *Ibid.*, s. 3.

[5] 1884, 22 S.L.R. 702.

[6] *M'Farlane* v. *Birrell*, 1888, 16 R. (J.C.) 28.

1191. Employers may make advances to their workmen for the purpose of contributions to a Friendly Society or Savings Bank.[2]

1192. The employer may make deductions for sharpening tools where an agreement has been made, provided it does not form part of the actual hiring agreement.[3]

1193. The Truck Act, 1896, had for its main object the protection of workmen who contracted for deductions or payments in respect of fines,[4] damaged goods,[5] and materials and tools.[6] Such deductions are permissible provided the contract in respect of them is contained in a public notice, or the contract is in writing signed by the workman. In either case the fine must be fair and reasonable. Where a cotton weaver in Lancashire was negligent in performing certain work, and in accordance with a custom which had long existed in the Lancashire trade his employers deducted a reasonable sum from the "standard list" rate of wages which had been agreed between the employers' and workers' organisations, the deduction was held to be legal on the ground that the contract between the parties contained the implied condition that the weaver should be paid according to the "standard list," subject to a fair deduction for bad work.[7]

SUBSECTION (4).—*Penalties.*

1194. Penalties are imposed for infringement of the provisions of the statutes.[8] These penalties are imposed on the employer, and are in addition to any liability which he may incur under the Acts to his employee.[9] The new offences created by the 1887 Act and the 1896 Act are made subject to the penalties imposed by the 1831 Act.[10] Special provision is made as to the liability of partners,[11] and to meet cases where the offence is that of an agent whether jointly with the employer or exonerating the employer.[12] The Act of 1831 was found not to apply to deductions for frame rents or the like in hosiery manufacture, and an Act was passed dealing specially with that industry.[13] Under that Act as under the Truck Acts, the provisions with regard to penalties are strictly construed.[14]

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[1] *Summerlee Iron Co.* v. *Thomson*, 1913 S.C. (J.) 34.

[2] 1831 Act, s. 24.

[3] 1887 Act, s. 8.

[4] 1896 Act, s. 1.

[5] *Ibid.*, s. 2.

[6] *Ibid.*, s. 3.

[7] *Riversdale Mill Co.* v. *Hait*, [1928] 1 K.B. 176; see *Chawner* v. *Cummings*, 1846, 8 Q.B. 311; *Archer* v. *James*, 1859, 2 B. & S., 61.

[8] 1831 Act, s. 9.

[9] Slessor and Henderson, Industrial Law, p. 193; *Wilson* v. *Cookson*, 1863, 32 L.J. M.C. 177.

[10] 1887 Act, s. 11; 1896 Act, s. 4.

[11] 1831 Act, s. 13.

[12] 1887 Act, s. 12.

[13] The Hosiery Manufacture Wages Act, 1874 (37 & 38 Vict. c. 48).

[14] *Willis* v. *Thorp*, 1875, L.R. 10 Q.B. 383.

SECTION 11.—APPRENTICES.[1]

SUBSECTION (1).—*The Contract of Apprenticeship.*

1195. An apprentice is one who engages to serve a master for a determinate number of years, on condition that the master instruct him in the knowledge of his trade or handicraft. The contract between master and apprentice, though it include a contract to work for hire, is primarily a contract to teach and to learn a certain trade or handicraft.[2] The contract can only be constituted by writing,[3] and the instrument in which the contract is embodied is termed an indenture. It is not binding unless it be probative or followed by *rei interventus.*[4] Where an apprentice brought an action to have his employers ordained to execute either a formal indenture of apprenticeship or a formal contract of service and founded on an unsigned memorandum, bearing that "A. G. started 11th September 1899," after which came a note of wages on an ascending scale for four successive years, it was held that the writing was too vague to constitute either contract.[5] Although the obligation of the master to teach and of the apprentice to learn is of the essence of the contract, it does not require to be stated in express terms in the writing which embodies the contract.[6] If a premium or consideration is paid to the master for taking an apprentice, the full sum to be paid must be set forth in the indenture, otherwise the persons who are parties to the contract are liable in a penalty, and the contract is null and void.[7] The indenture must be stamped. The duty is 2s. 6d.; but there is an exemption in the case of persons apprenticed at the sole charge of a parish or public charity.[8] Indentures for sea service are not liable to stamp duty.[9]

1196. If the apprentice be a pupil, his father, as his administrator-at-law, or the pupil's tutor signs the indenture. If the apprentice be a minor *pubes*, the minor's father, if he be alive, or the minor's curator, if he has any, may be a party to the indenture; but they only give their consent, and the minor expressly undertakes the obligations of the indenture. Lord Fraser was of opinion that a minor with curators or a father living could not enter into a contract of indenture without consent.[10] The minor may competently enter into a contract of indenture if his father be dead, or if he have no curators.[11] In some trades the age of apprentices is regulated. In the contract of indenture a cautioner is usually taken bound for the fulfilment of the apprentice's duties. He is liable for the apprentice's fraud as well as fault, and he is liable even although the indenture is voidable *quoad* the apprentice.[1]

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[1] Ersk. i. 7, 62; iii. 3, 16; Bankt. i. 58; Bell's Prin., s. 2185; Fraser, Master and Servant, 337; Umpherston, Master and Servant, 263.

[2] *Frame* v. *Campbell*, 1836, 14 S. 914, per Lord Jeffrey at p. 918; affd. 1839, M'L. & R. 595.

[3] *Murray*, 1863, 4 Irv. 466, per Lord Justice-Clerk Inglis; *Grant* v. *Ramage & Ferguson*, 1897, 25 R. 35; *Royce* v. *John Greig & Sons*, 1909 (O.H.), 2 S.L.T. 298.

[4] *Rymer* v. *M'Intyre*, 1781, Mor. 5726; *Neil and Tait* v. *Vashon*, 1807, Hume 20.

[5] *Gow* v. *M'Ewan & Son*, 1900 (O.H.), 8 S.L.T. 484.

[6] *Gordon* v. *Cran & Co.*, 1904, 12 S.L.T. 471.

[7] 33 & 34 Vict. c. 97, s. 40.

[8] 54 & 55 Vict. c. 39.

[9] 57 & 58 Vict. c. 60, s. 108 (1).

[10] Fraser, Master and Servant, p. 13; *Low* v. *Henry*, 1797, Hume 422; but see *Heddel* v. *Duncan*, 5th June 1810, F.C., and *Stevenson* v. *Adair*, 1872, 10 M. 919.

[11] Ersk. i. 7, 62.

SUBSECTION (2).—*Duties of Apprentice.*

1197. An apprentice must enter his master's service and remain there. He must be obedient, diligent, and respectful. Dismissal is justifiable for repeated insolence, gross disrespect and disobedience, repeated absence without leave, or gross neglect of business. Misconduct must be continued and repeated, and the apprentice must be corrected and remonstrated with, before dismissal is resorted to.[2] A master is justified in dismissing an apprentice who solicits business from his master's customers.[3] If he desert or is dismissed for improper conduct, an apprentice cannot demand the return of any part of the premium paid, or refuse payment of the whole of it.[4] An apprentice who enlists without the consent of his master can be reclaimed;[5] but the master must follow the procedure laid down in the Army Act, 1881.[6]

SUBSECTION (3).—*Duties of Master.*

1198. The principal duty of a master is to instruct the apprentice in his calling, either himself, or by an experienced deputy.[7] An apprentice is entitled to be taught the whole of his calling; and to teach him one particular part of the trade is insufficient.[8] A master may not ask an apprentice to work at another business than his trade.[9] It has been said that corporal punishment in moderation may be administered to an apprentice;[10] but it is questionable whether this would now be recognised, except in the case of sea apprentices. In any event, excessive chastisement will liberate the apprentice from his indenture.[11] A master cannot assign the indenture without the apprentice's consent.[12] If a master violate the indenture by neglecting to teach his apprentice, by treating him cruelly, or by rendering it impossible to carry out the contract, the apprentice is entitled to damages, and may leave his service.[13]

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[1] *Stevenson* v. *Adair*, 1872, 10 M. 919.

[2] Fraser, Master and Servant, pp. 351–353.

[3] *Malloch* v. *Duffy*, 1882 (O.H.), 19 S.L.R. 697.

[4] *Cuff* v. *Brown*, 1818, 5 Price 297.

[5] *Wright* v. *Lumsden*, 1742, Mor. 586; *Stewart*, 1778, Mor. 587 n.

[6] 44 & 45 Vict. c. 58, ss. 96, 144 (2), Sched. I.; and see for the Territorial Force, 7 Edw. VII. c. 9, s. 10 (1).

[7] *Gardner* v. *Smith*, 1775, Mor. 593.

[8] *Lyle* v. *Service*, 1863, 2 M. 115.

[9] *Peter* v. *Terrol*, 1818, 2 Mur. 28; *Chiesely* v. *Cuthbert*, 1665, Mor. 9150; *Watson* v. *Grindlay*, 1826, 5 S. 3.

[10] Ersk. i. 7, 62; *Forbes* v. *Dickson*, 1708, 4 Bro. Sup. 708; *Wight* v. *Burns*, 1884, 11 R. 217, per Lord Young.

[11] *Smart* v. *Gairns*, 1794, Hume 18.

[12] *Edinburgh Glasshouse Company* v. *Shaw*, 1789, Mor. 597.

[13] *Smart* v. *Gairns*, *supra*; *Lyle* v. *Service*, *supra*.

SUBSECTION (4).—*Disputes between Master and Apprentice.*

1199. The Employers and Workmen Act, 1875,[1] makes provision for dealing with disputes between master and apprentice in the Small Debt Court.[2] But this provision only applies to apprentices for whom no premium is paid, or where the premium, if any, does not exceed £25, and to apprentices in the business of a workman (not a domestic or menial servant), being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour.[3] The Court under this Act has the following powers: (1) It may make an order directing the apprentice to perform his duties under the apprenticeship. (2) If it rescinds the instrument of apprenticeship, it may, if it thinks fit to do so, order the whole or any part of the premium paid on the binding of the apprentice to be repaid. (3) Where an order is made directing the apprentice to perform his duties under the apprenticeship, the Court, if satisfied that the apprentice has failed to comply therewith, may order him to be imprisoned for a period not exceeding fourteen days.[4]

SUBSECTION (5).—*Termination of Contract.*

1200. When the stipulated period of apprenticeship is at an end, the apprentice is entitled to his discharge, and the master writes upon the indenture a discharge. The indenture may be dissolved by consent, death of either of the parties, or the master's sequestration. Where the apprentice binds himself to a firm, he must fulfil his indenture with any of the partners who survive,[5] except where the death of a partner operates as a dissolution of the firm.[6] Though the apprentice dies, the master is not bound to repay any portion of the apprentice fee previously paid, or to abstain from claiming a portion unpaid.[7] If the master becomes bankrupt, or deserts his business, the apprentice has a claim for a return of the fee paid; [8] but if the contract comes to an end through the master's death, no part of the premium can be reclaimed.

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[1] 48 & 49 Vict. c. 90; see para. 1129 *et seq.*, *supra.*

[2] 48 & 49 Vict. c. 90, s. 14.

[3] *Ibid.*, s. 12.

[4] *Ibid.*, ss. 5, 6.

[5] *Pagans* v. *M'Kie*, 1837, 10 Sc. Jur. 90.

[6] *Hoey* v. *M'Ewan*, 1867, 5 M. 814; *Tasker* v. *Shepherd*, 1861, 30 L.J. Ex. 207.

[7] *Shepherd* v. *Innes*, 1760, Mor. 589.

[8] *Cutler* v. *Littleton*, 1711, Mor. 583.

MASTER OF A SHIP.

See CARRIAGE BY SEA; MARITIME LIENS.

MATCHES.

See EXCISE; FACTORIES AND WORKSHOPS.

MATERNITY AND CHILD WELFARE.

See MEDICINE AND PHARMACY; MIDWIVES.

MATERNITY BENEFIT.

See NATIONAL HEALTH INSURANCE.

MAXIMS.

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SECTION 1.—INTRODUCTION.

1201. In legal discussions reference is constantly being made to certain principles of common sense and justice, which are necessarily the same in the legal systems of all nations. Many of these fundamental principles and rules, founded on experience and reason, have found expression in legal maxims, most of which are derived directly or indirectly from the Roman law. Nowhere is the faculty of clear and terse statement of legal principles more conspicuously exhibited than in the texts of the civil law. Accordingly, while the legal systems of modern civilised nations differ greatly in their technical rules and forms, all of them recognise the value of the simple and apposite statements of fundamental principles embodied in the maxims of Roman jurisprudence. The purposes served by the use of maxims in legal discussions are numerous. "Not only," observes Lord Bacon, in the preface to his collection of maxims, "will the use of maxims be in deciding doubt and helping soundness of judgment, but, further, in gracing argument, in correcting unprofitable subtlety and reducing the same to a more sound and substantial sense of law, in reclaiming vulgar errors, and, generally, in the amendment in some measure of the very nature and complexion of the whole law."

1202. A glance at the pages of Morison's Dictionary or at other early reports will shew how frequently in the older Scots law questions were determined by an immediate reference to the principles crystallised in legal maxims. The increased complexity of modern law, however, renders it a dangerous matter to apply general maxims without an accurate investigation of their bearing and qualifications. If incautiously used they are likely to be misleading, for, as observed by Lord Esher, M.R., the maxims "are for the most part so large and general in their language that they always include something which really is not intended to be included in them." [1]

1203. Compilations of legal maxims are numerous, but the two most valuable selections for the purposes of a Scottish lawyer are Broom's Legal Maxims [2] and Trayner's Maxims.[3] A valuable collection of the maxims referred to by Lord Stair in his Institutes is found in the index to More's Stair, *sub voce* "Maxims." A selection of maxims which have been of more frequent consideration and application by the Courts is appended hereto. The list is not, and is not intended to be, exhaustive.

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[1] *Yarmouth* v. *France*, 1887, 19 Q.B.D. 647, at p. 653.

[2] 6th ed., 1884.

[3] 4th ed., 1894.

SECTION 2.—ACCESSORIUM PRINCIPALE SEQUITUR.

1204. "The accessory right follows the principal." The doctrine of accession as a mode of acquiring property is derived from the Roman Law. The word *accessio* has been used by commentators not only in its proper sense of increase, but also as denoting the manner in which the increase becomes one's property This mode of acquisition is fully recognised in the law of Scotland, as in all legal systems, the effect of its operation being generally this, that when two things have an intimate connection with or dependence upon one another, the property of the principal thing draws after it that of its accessory. The accessory is merged in the principal, and previous rights of ownership in it disappear.[1] Accession is either natural or artificial. By natural accession the young of tame and domestic animals belong to the owner of the mother, and the fruits and produce of the earth to the proprietor of the soil. A general exception must, however, be made of industrial fruits, which go with the property of the seed and labour.[2] By natural accession, likewise, the insensible addition made to land by the gradual accumulation of soil carried down by a river or washed in by the sea, accrues to the owner of the ground, and the same rule applies in the case of the gradual deviation of a river from its course. On the other hand, if the change be rapid and violent, as by the tearing away a part of a river bank, or the sudden and marked deflection of a river's course, there is no acquisition by accession, unless by acquiescence of the proprietor whose land is diminished. Natural forces may be set in motion or directed by artificial means ; if the operations have been lawful, the same doctrines seem to apply as if the process of change had been natural from the beginning, but a landowner is not entitled to profit by his own wrongful act or any of its consequences.[3]

1205. Artificial or industrial accession is produced by the application of skill or industry whereby the value of a thing is increased. It falls under the four general heads of Adjunctio, Specification, Commixtion, and Confusion.[4] *Adjunctio* includes *œdificatio*, *plantatio*, and *satio*, where a man builds, plants, or sows on the ground of another. In Roman law it also included the accession of writing to parchment and of paintings to the canvas, but Erskine points out[5] that these more properly fall under *specificatio*, or the converting of another's materials into a new form or species. In all these different modes of accession the property of the principal draws after it that of the accessory, the only difficulty being to fix which is the principal. The following rules have been given for ascertaining this: That of two substances one of which can exist separately, the other not, the former is the principal; that where both can exist separately, the principal is that which the other is taken to adorn or complete; that in the absence of these indications, bulk prevails; next value. And in all cases where there can be no separation, the property is with the owner of the principal, leaving to the other a claim for indemnification.[1]

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[1] Stair, ii. 1, s. 34 ; Bankt. i. 506, s. 10 ; Ersk. ii. 1, s. 14 *et seq.*

[2] Bell's Prin. s. 1473.

[3] Rankine on Landownership, 4th ed., p. 115.

[4] See PROPERTY ; CONFUSIO, Vol. IV. p. 386, *ante.*

[5] Inst. ii. 1, s. 15.

SECTION 3.—ACTIO PERSONALIS MORITUR CUM PERSONA.

1206. "An action for strictly personal wrong dies with the person." See ACTION.[2]

SECTION 4.—ACTOR SEQUITUR FORUM REI.

1207. "The pursuer follows the forum of the defender," a maxim of the Roman law. The oldest form of the maxim is probably that found in the Vatican Fragments, *Actor rei forum sequi debet.*[3] It seems from the earliest period to have been an established rule of civil procedure among the Romans that the pursuer should raise his action before the Court of the defender's domicile[4]—the corresponding rule in criminal matters being expressed in the maxim, *In criminali negotio rei forum accusator sequatur.*[5] In Scotland the maxim has been adopted and is followed generally. "The reason is," says Kames, "that the plaintiff must apply to the judge who hath authority over his party, and can oblige him to do his duty. This must be the judge of that territory within which the party dwells and has his ordinary residence."[6] "Accordingly," says Erskine, "it imports nothing where the pursuer hath his domicile, for he must follow that of the defender, since no defender is obliged to appear before a Court to which the law hath not subjected him."[7] Various exceptions were later introduced in the Roman law, and are also recognised in our own law in real actions and others. See JURISDICTION.[8]

SECTION 5.—ACTUS NON FACIT REUM, NISI MENS SIT REA.

1208. "The act does not make the performer of it a criminal unless there be also criminal intention." The essence of all crime is the felonious or criminal intention with which the act has been committed: what would be criminal if the intention was present, might not be so if that intention did not exist. Thus, to take the property of another in mistake or ignorance or mere heedlessness would not be theft. So also a person may offer counterfeit coin in ignorance or in error and commit no crime; but another doing the same act in the knowledge that the coin offered is counterfeit, is criminal, because of the criminal intention to utter base coin. This maxim, however, must be applied with caution, for the want of intention is not always a sufficient defence. Though the act done be not that which was intended, the perpetrator may be guilty of acting criminally. Again, crime may be committed where there is no intention to do wrong but merely neglect of duty, which results in injury to others. Further, where anything is positively forbidden by statute the commission of that thing, even ignorantly, may infer punishment or penalty, although there be no purpose or intention to violate the law. See CRIME.[1]

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[1] Bell's Prin., s. 1298; Ersk. ii. 1, s. 14.

[2] Vol. I. p. 100, *ante*.

[3] No. 325, Huschké, Jurispr. Antiq. Just., p. 769.

[4] Cod. iii. 13, 2.

[5] Cod. iii. 13, 5.

[6] Kames, Law Tracts, i. 352.

[7] Inst. i. 2, 16.

[8] Vol. VIII. p. 498, *ante*.

SECTION 6.—AD AUCTORITATEM PRÆSTANDAM.

1209. "For interposing or adding their authority." Interdictors and tutors and curators *ad litem* are appointed for this purpose merely, and incur no personal liability through the performance of the duties of their office. Tutors and curators—the one given as a guardian of the pupil's person, the other of the minor's estate—are liable for the exercise of a care and diligence in which persons of the class we are dealing with are not bound. Interdictors give their consent to the deeds of the person interdicted, and by such consent incur no responsibility in warrandice, etc.; while tutors and curators *ad litem*, by their becoming parties to a suit in that character, incur no liability for expenses.[2] Such persons are appointed merely to their respective offices *ad præstandam auctoritatem.*

SECTION 7.—AD CIVILEM EFFECTUM.

1210. "As to the civil effect." The civil effect referred to in this phrase is the effect or result of an act at common law, as distinguished from the effect or result of the same act before a criminal tribunal. Many acts have this double effect. A person charged with culpable homicide may be sentenced to be punished for his criminal act by the Justiciary Court, but that does not exclude the civil effect of his act, which still exists in the shape of an action for assythment at the instance of the next-of-kin of the deceased. A thief is liable at common law for the value of the goods stolen, even although he has been punished for the theft. The decision of the one Court on the civil effect of an act does not in any case rule the decision of the other Court.[3]

SECTION 8.—AD SUSTINENDA ONERA MATRIMONII.

1211. "To bear the burdens or expenses of the married state." The dowry brought by a wife at her marriage is given to the husband for this purpose. At common law he is not liable for his wife's debts after her decease, unless the dowry has been excessive, for otherwise he is not accounted *lucratus* by the dowry, it having been given for the onerous cause of meeting the expenses of the married state, and presumed to have been so expended.[4] The common law liability of a husband for his wife's antenuptial debts was limited by the Married Women's Property Act, 1877,[1] to the amount of any property (including dowry or tocher) which he may have received through his wife. This Act was not repealed by the Married Women's Property (Scotland) Act, 1920.[2] Dowry being given for the above purpose to the husband, should the marriage be dissolved by divorce on account of the husband's desertion, he is bound to restore the tocher,[3] there being no room for its intended application.

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[1] Vol. V. at p. 54, *ante.*

[2] Maclaren, Court of Session Practice, p. 186. But see INTERDICTION, Vol. VIII. p. 355, *ante.*

[3] *Lamb* v. *Threshie*, 1892, 3 White 261; 19 R. (J.) 78; *Demetriades* v. *Northern Assurance Co.*, 1925 S.C. (H.L.) 6.

[4] Ersk. i. 6, 17; *Bennet* v. *Lepers*, 1665, Mor. 5871.

SECTION 9.—ÆDIFICATUM SOLO CEDIT.

1212. This maxim, or the more correct form, *Inædificatum solo solo cedit*, expresses the rule of law that where a moveable subject is annexed to an immoveable, the former becomes, as it were, part of the latter, and the property in the moveable passes to the owner of the immoveable. The moveable, in other words, is regarded as an accessory of the immoveable, and the rule is an application of the doctrine of *accessio*.[4] This mode of acquiring property is technically known as *inædificatio*. The maxim is not found, in either of the forms above mentioned, in the *Corpus Juris*, but is a gloss on the brocard, *Omne quod inædificatur solo cedit*, which frequently occurs in the texts.[5]

1213. In Scots law the main exception to the application of the maxim is in the case of FIXTURES;[6] but, as the indulgence granted by the law to "fixtures" tends to increase, this exception has been gradually becoming more extended in its scope. In Scotland the doctrine of recompense is fully recognised in the case of buildings erected *in bona fide* by one man on the ground of another.[7]

SECTION 10.—ÆMULATIO VICINI.

1214. "Malice towards a neighbour." This is a plea which was competent in the Roman law,[8] adopted from it by Erskine,[9] Bankton,[10] and Bell,[11] and frequently tendered in argument in Scots cases. It goes to this, that one shall at the instance of a neighbour be restrained from, or made liable in damages for, an otherwise lawful use of property to the detriment of neighbouring property, if the sole motive be malice, or intent to injure. But Lord Watson, in an English case of abstracting or diverting subsoil water on its way to the ground of a neighbour,[12] observed: "I desire, however, to say that I cannot assent to the law of Scotland as laid down by Lord Wensleydale in *Chasemore* v. *Richards*.[13] The noble and learned lord appears to have accepted a passage in Mr. Bell's Principles (s. 966) which is expressed in very general terms, and is calculated to mislead, unless it is read in the light of the decisions upon which it is founded. I am aware that the phrase *in æmulationem vicini* was at one time frequently, and is even now occasionally, very loosely used by Scottish lawyers. But I know of no case in which the act of a proprietor has been found to be illegal, or restrained, as being *in æmulationem*, where it was not attended with offence or injury to the legal rights of his neighbour. In cases of nuisance a degree of indulgence has been extended to certain operations, such as burning limestone, which in law are regarded as necessary evils. If a landowner proceeded to burn limestone close to his march, so as to cause annoyance to his neighbour, there being other places on his property where he could conduct the operation with equal or greater convenience to himself, and without giving cause of offence, the Court would probably grant an interdict. But the principle of *æmulatio* has never been carried further. The law of Scotland, if it differs in that, is in all other respects the same as the law of England. No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious." [1]

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[1] 40 & 41 Vict. c. 29.
[2] 10 & 11 Geo. V. c. 64.
[3] Act 1573, c. 55.
[4] See PROPERTY.
[5] *E.g.* Inst. ii. 1, 29; Dig. 41, 1, 7, 10.
[6] Vol. III. p. 149, *ante*.
[7] Rankine, Land-Ownership, 4th ed., p. 117.
[8] Dig. 39, 3, 1, 12; 39, 3, 2, 9; Nov. 63, c. 1.
[9] ii. 1, 2.
[10] ii. 7, 15; iv. 45, 112.
[11] Prin., ss. 964, 966.
[12] *Mayor of Bradford* v. *Pickles*, [1895] A.C. 587, at p. 597.
[13] 7 H.L.C. 349, at p. 388.

SECTION 11.—AFFIRMANTI INCUMBIT PROBATIO.

1215. The leading rule is that the burden of proof rests upon him who alleges the affirmative.[2] He must have some affirmative evidence; and the fact that the evidence led in support of his case and negativing it is unworthy of credit does not prove it.[3] The operation of the rule is determined not by the mere form, but by the substance of the averment; and, accordingly, it applies where a person asserts, and thereby makes part of his case, that a certain state of things does not exist.[4] The *onus* of proof may be shifted from the party upon whom it rests in the first instance, if he prove facts which, in the absence of contrary evidence, raise the presumption, as the only direct and logical inference deducible from them, that his averment is true; and it will then rest upon the opposite party, until he has proved facts which, while uncontroverted, are sufficient to establish his case.[5] Similarly, in criminal cases the *onus* will be shifted by proof of facts rebutting the presumption in favour of innocence.

1216. In conjoined actions the incidence of the onus will depend upon the presumptions arising in the circumstances. Thus the onus will be on a defender who is forced to raise an incidental process in order to establish his defence. It is otherwise where such an action is not necessary for the defence. In competitions between heirs the onus will not be laid on one rather than on another, as each is *in petitorio*; but where a claimant is served it will rest upon him who seeks to reduce the service.[1] The same rule applies in the case of the Crown, unless the reduction is at its instance as *ultimus hæres*.[2] In proving the constitution and subsistence of a debt by the defender's writ or oath, the onus rests on the pursuer; but where the defender's oath is qualified, the qualification, if extrinsic, must be proved by him.[3] In such a case the defender's waiver of the plea of prescription will not shift the onus.[4]

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[1] See also *Allen* v. *Flood*, [1898] A.C. 1; *Campbell* v. *Muir*, 1908 S.C. 387. See NUISANCE.

[2] Dickson on Evidence, 2nd ed., ss. 24–40.

[3] *Cameron* v. *Yeats*, 1899, 1 F. 456.

[4] *Dominion Bank* v. *Bank of Scotland*, 1891, 18 R. (H.L.) 21; *Robertson's Tr.* v. *Royal Bank of Scotland*, 1890, 18 R. 12.

[5] *Williams* v. *Dobbie*, 1884, 11 R. 982; *Macfarlane* v. *Thompson*, 1884, 12 R. 232; *Adam* v. *J. & D. Morris*, 1890, 18 R. 153; *Clyde Shipping Co.* v. *Miller*, 1907 S.C. 1145; *Home Drummond* v. *Pepper* (O.H.), 1908, 15 S.L.T. 688.

SECTION 12.—ALIUD EST CELARE, ALIUD TACERE.

1217. "It is one thing to conceal, another thing to be silent." Where a subject is sold that is defective or imperfect, the buyer can in some cases be restored against his purchase, and in some he cannot. If the seller warrants the subject sold to be sound or perfect, the buyer is of course entitled to reject the article on discovery of the defect, and to recover the price if this has been paid. But where the subject sold is submitted to the inspection of the buyer, and no art is used to conceal the defects, then the buyer's eye is his merchant, and if he buys a defective subject he must himself bear the loss. On the other hand, if anything is done to conceal the defects, either actively or passively, the buyer has his remedy against the seller. Concealment, however, is very different from mere silence. A seller is not legally bound to proclaim the defects of the subject offered for sale: he may remain silent and allow the buyer to inspect the article and satisfy himself before concluding the transaction whether it is defective or not. Such silence does not amount either to implied warranty or to concealment.[5] But concealment of facts which ought to be disclosed will vitiate the contract or obligation which has thus been entered into or obtained, or, in cases under the Sale of Goods Act, failure to comply with the provisions of the Act as to warranty will give the deceived buyer a legal remedy.[6]

1218. The non-disclosure of material facts is fatal to a contract of insurance. In such a contract it is the duty of the insured "carefully and diligently to review all the facts known to himself bearing on the risk proposed to the insurers, and to state every circumstance which any reasonable man might suppose could in any way influence the insurers in considering and deciding whether they will enter into the contract. Any negligence or want of fair consideration for the interest of the insurers on the part of the insured leading to the non-disclosure of material facts, though there be no dishonesty, may therefore constitute a failure in the duty of disclosure which will lead to the voidance of the contract."[1]

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[1] *Willox* v. *Young*, 1846, 8 D. 1226; *M'Lean* v. *M'Lean*, 1849, 11 D. 880; 31 & 32 Vict. c. 101, ss. 35, 41; but see *Watson* v. *Watson*, 1834, 7 W. & S. 535.

[2] *Alexander* v. *Officers of State*, 1868, 6 M. (H.L.) 54; *M'Lean* v. *Officers of State*, 1846, 5 Bell's App. 60.

[3] *Cowbrough & Co.* v. *Robertson*, 1879, 6 R. 1301.

[4] *Simpson* v. *Stewart*, 1875, 2 R. 673; *Kerr's Trs.* v. *Ker*, 1883, 11 R. 108.

[5] *Keats* v. *Earl of Cadogan*, 1851, 10 C.B. 591.

[6] *Railton* v. *Matthews*, 1844, 6 D. 536; 3 Bell's App. 56; *Dempsters* v. *Rae*, 1873, 11 M. 843.

SECTION 13.—ARGUMENTUM AB INCONVENIENTI PLURIMUM VALET IN LEGE.

1219. "An argument drawn from inconvenience has much force in law." In certain cases an argument *ab inconvenienti* has great weight; and such an argument generally arises in questions of construction, either of a private writ or of an Act of Parliament, where two or more different constructions are open to the Court. If there be equivocal expressions, and great inconvenience must necessarily follow from the adoption of one construction of them, this will go far to shew that such a construction is not according to the true intention or meaning of the granter or the legislature, and will lead to the adoption of some other construction which will not be followed by such inconvenience. If, however, the words be plain and admit fairly of only one construction, that construction must be adopted, although resulting in inconvenience.[2]

SECTION 14.—ARMA IN ARMATOS SUMERE JURA SINUNT.

1220. "The laws permit arms to be used against the armed"; or, to resist violence by violence. If anyone attempts by violence to dispossess another of a subject in his possession, the possessor may use violence to maintain his possession, but not to recover that of which he has been so deprived. No more violence than is reasonably necessary to secure this object is legitimate, and any excess will be punishable.[3]

SECTION 15.—ASSIGNATUS UTITUR JURE AUCTORIS.

1221. "The assignee is clothed with the right of his author." This legal maxim expresses the general rule applicable in the transfer of obligations, that the assignee acquires no higher right than his cedent, and that all exceptions pleadable by the debtor in the obligation against the cedent are pleadable against the assignee. It is no exception to this rule that collateral obligations or latent trusts, which might have been enforceable against the cedent by third parties, are not enforceable against the assignee, because these are not part of, but extraneous to, the right assigned.[4] The only real exception to the rule occurs in the case of negotiable instruments, the *bona-fide* holder of such instruments having a good title, notwithstanding defects in the title of the transferor.

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[1] Per Lord Pres. Inglis in *Life Association of Scotland* v. *Foster*, 1873, 11 M. 359; *Ionides* v. *Pender*, 1874, L.R. 9 Q.B. 531; *Demetriades* v. *Northern Assurance Co.*, 1925 S.C. (H.L.) 6; *cf.* also Marine Insurance Act, 1906 (6 Edw. VII. c. 41).

[2] Maxwell on Interpretation of Statutes, 6th ed., p. 357; Craies on Statute Law, 3rd ed., p. 82; *The "Duke of Buccleuch,"* 1889, 15 P.D. 86, at p. 96; *In re Brocklebank*, 1889, 23 Q.B.D. 461; *Hill* v. *East and West India Dock Co.*, 1884, 9 App. Cas. 453; *Heritable Reversionary Co.* v. *Millar*, 1892, 19 R. (H.L.) 43, at p. 54.

[3] Macdonald, Criminal Law, 4th ed., p. 138.

[4] Bell, Com., M'L.'s ed., i. 302; *Scottish Widows' Fund* v. *Buist*, 1876, 3 R. 1078, per Lord Pres. Inglis at p. 1082.

1222. The maxim is also employed, with reference to the transfer of property generally, as expressive of the rule that no one can give a better title than he himself has, *Nemo plus juris ad alium transferre potest quam ipse habet.*[1] To the doctrine thus widely expressed there are certain exceptions to be noted. For example, one who has obtained property by fraud may give a good title to a *bona-fide* purchaser.[2] But this exception is rather apparent than real, as a fraudulent contract is not void, but only voidable, and accordingly, until it is set aside, there is a good title to transfer. Again, there is the large class of cases provided for by the Factors Acts (now consolidated in the Factors Act, 1889,[3] and the Factors (Scotland) Act, 1890[4]), in which persons in the possession of goods, or of documents of title to goods, are held to be able to confer a good title by way of sale or pledge for value. The rule in these cases proceeds upon the theory of implied authority. So also the purchaser of goods, to whom a document of title[5] has been transferred, may transfer such document to a person who takes it in good faith and for valuable consideration, so as to defeat the unpaid seller's right of lien or stoppage *in transitu.*[6] See ASSIGNATION[7]: DOCUMENT OF TITLE.[8] With regard to this maxim generally see the cases undernoted.[9]

SECTION 16.—BONA FIDES NON PATITUR UT BIS IDEM EXIGATUR.

1223. "Good faith does not permit that the same thing be twice exacted." An obligation once fulfilled or a debt once paid cannot again be enforced or recovered provided the debt was paid or the obligation performed to the person having the title to demand performance or payment; accordingly it is a good defence to an action for payment of money that the pursuer is not the creditor in the obligation and cannot validly discharge it; for if payment were made to him the real creditor might afterwards enforce payment and thus the debtor might have to pay the same debt twice. On the same principle no one can be punished twice for the same delict or crime.[10] See NEMO DEBET BIS VEXARI.[11]

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[1] Dig. 50, 17, 54.

[2] *Addie* v. *Western Bank*, 1864, 2 M. 809; 1865, 3 M. 899; revd. 1867, 5 M. (H.L.) 81.

[3] 52 & 53 Vict. c. 45.

[4] 53 & 54 Vict. c. 40.

[5] Factors Act, 1889 (52 & 53 Vict. c. 45), s. 1; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1).

[6] 56 & 57 Vict. c. 71, s. 47.

[7] Vol. II. p. 1, *ante.*

[8] Vol. VI. p. 29, *ante.*

[9] *Redfearn* v. *Somervail*, 1805, Mor. App., "Personal and Real," 3; 1813, 1 Dow 50; *Burns* v. *Laurie's Trs.*, 1840, 2 D. 13848; *North British Rly. Co.* v. *Lindsay*, 1875, 3 R. 168; *Scottish Widows' Fund* v. *Buist*, *supra*; *Heritable Reversionary Co.* v. *Millar*, 1891, 18 R. 1166; 19 R. (H.L.) 43; *Société du Gaz de Paris* v. *Armateurs Français*, 1925 S.C. 332; 1926 S.C. (H.L.) 13.

[10] Trayner, Latin Maxims, p. 62.

[11] Para. 1275, *infra.*

SECTION 17.—CASUS IMPROVISUS.

1224. "An unforeseen case"; and therefore a case not provided for. This phrase is of frequent occurrence in relation to questions of construction of statutes, contracts, and testamentary deeds. If an Act of Parliament has been passed for the removal of some inconvenience, or the suppression of some evil, and specifies the circumstances or cases in which it is to have application, and a case occurs which is not specified by the Act, in which, nevertheless, the application of the statute would be beneficial, this is a *casus improvisus*, and neither the procedure nor the provisions of the Act can be applied to it. The statute cannot be strained so as to be made applicable to a case for which it does not provide. Statutes, however, which are purely remedial are construed liberally, and are often extended to cases similar to those mentioned in the Act, although such cases do not fall within the letter of the enactment.[1] In a clause of reference the parties may stipulate to have their differences settled by arbiters; but if a difference should arise between them which is not specified or held as included in the specification made, this is a *casus improvisus*, and such a difference must be settled by a Court of law, the clause of reference not having provided for its settlement. An example of this will be found in the case of *Blaikie*.[2] Again, it is usual in charter-parties to stipulate that if the ship is detained in loading or discharging beyond a certain number of days, demurrage shall be due at a certain rate per day. To recover the demurrage, the owners merely require to prove the detention. But if this clause were omitted, the owners of the vessel would have no claim for demurrage under the charter-party however long the vessel was detained, that being a *casus improvisus*. Their claim would then resolve itself into a claim of damages for the wrongous or undue detention of their vessel, in which they would require to prove that the detention of the vessel had been unreasonable and that the damage they had suffered thereby amounted to the sum claimed. The unforeseen event most frequently occurs in the construction of testamentary writings where the Court in dealing with *casus improvisus* will, if possible, avoid intestacy and reach a conclusion consistent with the testator's intention.[3]

SECTION 18.—CASUS OMISSUS PRO OMISSO HABENDUS EST.

1225. "A case" (or class of cases) "omitted is to be held as intentionally omitted." This is a rule to be observed in the construction of statutes, and in considering whether they are applicable to certain cases analogous to the cases therein provided for. An illustration of this phrase will be found in Stair.[1] Compare the maxim *Enumeratio unius est exclusio alterius.*[2]

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[1] *Robb* v. *School Board of Logiealmond*, 1875, 2 R. 422.

[2] *Blaikie* v. *Aberdeen Rly. Co.*, 1851, 13 D. 527; revd. 1854, 1 Macq. 461.

[3] *Reynolds* v. *Miller's Trs.*, 1884, 11 R. 759; *Aberdein's Trs.* v. *Aberdein*, 1870, 8 M. 750; *Flett's Trs.* v. *Elphinstone* (O.H.), 1900, 8 S.L.T. 310; *Kennedy's Trs.* v. *Warren*, 1901, 3 F. 1087; *Fyfe's Trs.* v. *Duthie*, 1908 S.C. 520.

SECTION 19.—CAUSA PROXIMA ET NON REMOTA SPECTATUR.

1226. "The near and not the remote cause is regarded." This maxim is frequently cited in reference to questions arising out of marine insurances, but the principle of it is of general application in all cases where legal liability for loss or damage has to be ascertained.[3] It is equally applicable in criminal as in civil matters. Thus, for example, it is no defence to a charge of culpable homicide that the blow which occasioned death would not have done so had the victim been a normally healthy man.[4] See also NEGLIGENCE.

SECTION 20.—CAUSA DATA CAUSA NON SECUTA.

1227. "Consideration given the counterpart failing." In such cases the law of Scotland, founding upon the principle contained in this maxim, gives relief and allows recovery of the consideration granted without return.[5]

SECTION 21.—CESSANTE RATIONE LEGIS CESSAT IPSA LEX.

1228. "When the reason for a law ceases, the law itself ceases"; or, when the grounds or reasons which gave rise to a law cease to exist, the law itself ceases to exist and falls into desuetude. It is obvious that if the circumstances which rendered the passing of a law necessary cease to exist, the law itself will cease to be operative. This is one of the grounds upon which a statute can in Scots law be held to have fallen into desuetude and become of no effect.[6]

SECTION 22.—CHIROGRAPHUM APUD DEBITOREM REPERTUM PRESUMITUR SOLUTUM.

1229. When a deed of obligation is found in the granters possession it is presumed that the obligation has been implemented or discharged.[7] The presumption is very strong in the case of documents which are frequently discharged by redelivery, *e.g.* bills,[8] and personal bonds.[9] It has also been held to apply to a heritable bond perfected by sasine,[10] to a trust deed found in the trustee's repositories after his death,[1] and where the cautioner in a bond [2] and the creditor in an assignation [3] had possession of the deed. The presumption does not apply to cases in which it is the practice to use a deed of retrocession,[4] or to bilateral deeds [5] or where the creditor holds a deed which recognises the subsistence of the debt, *e.g.* a bond of corroboration.[6] The presumption can be redargued only by the granter's writ or oath, save where force or fraud is alleged,[7] or where the special facts of the case relative to possession by the granter, as admitted or explained by him, are such as to render it desirable for the ends of justice that the enquiry should not be limited to his writ or oath.[8] See DELIVERY OF DEEDS; [9] PAYMENT.

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[1] iii. 2, 49.

[2] See para. 1256, *infra.*

[3] *Admiralty Commissioners* v. *Owners of S.S.* "*Volute,*" [1922] 1 A.C. 129; *Radley* v. *London and North-Western Rly. Co.*, 1876, 1 App. Cas. 759.

[4] Macdonald on Criminal Law, 6th ed., p. 140.

[5] *Cantiere San Rocco* v. *Clyde Shipbuilding Co.*, 1923 S.C. (H.L.) 165; *cf.* also Gloag on Contract, 2nd ed., p. 58, and cases there cited.

[6] *Bute* v. *More*, 1870, 1 Coup. 495; 9 R. 180; *cf.* also *Middleton* v. *Tough*, 5 Adam 585; 1908 S.C. (J.) 32; *M'Ara* v. *Mags. of Edinburgh*, 1913 S.C. 1059.

[7] See Stair, i. 7, 14; i. 18, 3; iv. 32, 3; iv. 45, 24; Ersk. iii. 4, 5; More's Notes on Stair, p. 126; Dickson on Evidence, ss. 173, 174, 932, 935; Bell, Prin., s. 566.

[8] *Campbell* v. *Cockburn*, 1728, Mor. 11534; *Cumming* v. *Hendrie*, 1861, 23 D. 1365.

[9] *Monkton* v. *Carmichael*, 1623, Mor. 11404; *Gordon* v. *Johnstone*, 1703, Mor. 11408.

[10] *Rollo* v. *Simpson*, 1710, Mor. 11411.

SECTION 23.—CHIROGRAPHUM NON EXTANS PRESUMITUR SOLUTUM.

1230. When the creditor in a written obligation cannot produce the document of debt, the presumption is that the debt has been discharged.[10] The effect of the presumption is not to impair the subsistence of the debt, but to deprive the creditor of a ground of action,[11] and in order to rebut it, an action of proving of the tenor is in general necessary. See ACTION.[12]

SECTION 24.—COMMODUM EX INJURIA SUA NEMO HABERE DEBET.

1231. "No one should take advantage by his own wrongful act." *Injuria* includes any act that is illegal or wrongful. Accordingly, where one has obtained a deed in his favour by fraud or circumvention the deed is set aside and the grantee precluded from taking benefit under it, because it is the offspring of his own illegal act. In like manner, where a person has induced another wrongfully to enter into a contract he cannot enforce the contract to which his fraud or other illegal act gave rise. Further, a principal may be liable for the fraud of his agent if he is thereby *lucratus*.[13] See AGENCY; [14] MISREPRESENTATION AND FRAUD.

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[1] *Charteris* v. *Charteris*, 1712, Mor. 11413.

[2] *Monkton* v. *Carmichael*, 1623, Mor. 11404; *Gordon* v. *Johnstone*, 1703, Mor. 11408.

[3] *Fairley* v. *Dick's Crs.*, 1666, Mor. 12278.

[4] *Liermont* v. *Gordon*, 1686, Mor. 11406, 16181; 2 Bro. Supp. 57.

[5] *Stewart* v. *Riddoch*, 1672, Mor. 11406; Dickson on Evidence, s. 925.

[6] *M'Gowan and Boyd* v. *Montgomery*, 1703, Mor. 11407.

[7] *Edward* v. *Fyfe*, 1823, 2 S. 431; *Knox* v. *Crawford*, 1862, 24 D. 1088.

[8] See *Ferguson, Davidson & Co.* v. *Jolly's Tr.*, 1880, 7 R. 500; *Henry* v. *Miller*, 1884, 11 R. 713.

[9] Vol. V. p. 533, *ante.*

[10] *Swinton* v. *Laird of Tofts*, 1679, 2 Bro. Supp. 246; cf. *Ryrie* v. *Ryrie*, 1840, 2 D. 1210.

[11] *Goldie* v. *Poldean's Crs.*, 1737 Elch. *voce* Presumption, No. 9.

[12] Vol. I. p. 55, *ante.*

[13] *Hockey* v. *Clydesdale Bank*, 1898, 1 F. 119; *Clydesdale Bank* v. *Paul*, 1877, 4 R. 626; *Houldsworth* v. *City of Glasgow Bank*, 1880, 7 R. (H.L.) 53.

[14] Vol. I. p. 194, *ante.*

SECTION 25.—COMMUNIS ERROR.

1232. This phrase, and the maxim *communis error facit jus*, belong to the sphere of practice, as recognised by law, and are of narrow application. A *communis error* arises when an erroneous practice, in some more or less technical matter, has become general and inveterate; and litigated questions with regard to such errors have been dealt with by the Court of Session by recognition of the practice in the particular case, along with its correction for the future by Act of Sederunt.[1]

SECTION 26.—CONSENSUS TOLLIT ERROREM.

1233. "Consent takes away (the effect of) error"; or, the effect of erroneous proceeding. In matters regulated by the common law and in matters of practice parties may consent to overlook an error in pleading or process. Thus by consenting to appear as defender in a Scots Court a foreigner can waive the plea of "no jurisdiction." By taking no objection a party can allow admission of evidence in a cause which would be otherwise inadmissible. But in matters regulated by statute the consent of parties cannot correct an infringement of the provisions of the statute, *e.g.* parties cannot confer on a Court a jurisdiction which is excluded by statute—nor can their consent allow, unless in exceptional cases, addition to or alterations on an interlocutor of the Court.[2]

SECTION 27.—CONSUETUDO DEBET ESSE CERTA, NAM INCERTA PRO NULLIS HABETUR.

1234. "Custom ought to be fixed (or settled), for if variable it is held as of no account." In construing mercantile and other contracts, and determining the rights and obligations of parties arising from mercantile dealings, custom or usage of a particular place or a particular trade may have to be considered. To have any effect, however, the custom must be inveterate and uniform, and generally known in the particular trade, for if it be otherwise it cannot be binding,.[3] The custom founded upon must also be reasonably fair.[4] It must be kept in mind, however, that while proof of custom will be allowed to explain or add to a contract, it is inadmissible for the purpose of contradicting the written contract.[5] See CUSTOM AND USAGE.[6]

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[1] *Beattie* v. *Park*, 1830, 8 S. 784; *Russell* v. *Rae*, 1837, 15 S. 1263.

[2] *Campbell* v. *Caledonian Rly. Co.*, 1899, 2 F. 25; *Torry* v. *Torry* (O.H.), 1919, 1 S.L.T. 151; *Marshall* v. *Caledonian Rly. Co.*, 1899, 2 F. 6.

[3] *Kirchner* v. *Venus*, 1859, 12 M.P.C. 399; *Hogarth* v. *Leith Cotton Seed Oil Co.*, 1909 S.C. 955; *cf.* also Gloag on Contract, 2nd ed., p. 379.

[4] *Smith* v. *Bruce*, 1890, 17 R. 1000; *Devonald* v. *Rossea*, [1906] 2 K.B. 728.

[5] *Gordon* v. *Robertson*, 1826, 2 W. & S. 115; *Tancred, Arrol & Co.* v. *Steel Co. of Scotland*, 1887, 15 R. 215; 1889, 16 R. 440; 1890, 17 R. (H.L.) 31; *Rowtor S.S. Co.* v. *Love & Stewart*, 1916 S.C. 223; 1916 S.C. (H.L.) 199.

[6] Vol. V. p. 354, *ante*.

SECTION 28.—CONSUETUDO EST OPTIMA LEGUM INTERPRES.

1235. "Custom or usage is the best interpreter of laws." A custom or usage following upon a statute is the best interpreter of what the statute was meant to enact in cases where there are ambiguous expressions in the statute, as shewing what was regarded as the meaning and purpose of the statute among those by whom, or for whom, the Act was passed. Custom, to have this effect, must be inveterate and uniform. Where the enactment is unambiguous, evidence of contrary custom is irrelevant for the purpose of construction.[1]

SECTION 29.—CONTEMPORANEA EXPOSITIO EST OPTIMA ET FORTISSIMA IN LEGE.

1236. "A contemporaneous construction is in law the best and strongest." The view which was taken at the time an Act of Parliament was passed as to its meaning, or the construction which was then or soon after put upon its provisions, by those acquainted with the circumstances which called for the enactment or made it expedient, is more likely to be correct (where a difference of opinion arises) than the construction put upon it long after by those who can only gather its purpose from the terms in which it is expressed. A contemporaneous exposition is therefore always preferred to a later one. The same consideration also applies in the interpretation of old deeds and writings.[2]

SECTION 30.—CONTRA BONOS MORES.

1237. "Against morality." All contracts or obligations which are given for immoral consideration or which arise out of an immoral transaction are ineffectual, and cannot be enforced. This principle is expressed in two other maxims—*Ex pacto illicito non oritur actio* and *Ex turpi causa non oritur actio.* Thus a bond given for payment of the wages of prostitution, or as an inducement to commence or continue improper intercourse cannot be enforced, but a bond given after the immoral intercourse has ceased, as a separation or compensation for injury done, will be sustained.[3] A bond or bill granted for money lost or won at gambling or betting cannot be enforced against the granter by the grantee; but if the granter has paid the amount to the grantee he cannot claim repetition.[4] Bonds granted in consideration of the grantee bringing about a certain marriage are regarded as *contra bonos mores* and cannot be enforced. According to the civil law the sale by an heir of his hope of succession during his ancestor's life was *contra bonos mores* and ineffectual; but the law of Scotland recognises that a *spes successionis* may legally be made the subject of sale.[1] See ILLEGAL AND IMMORAL CONTRACTS.[2]

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[1] *Clyde Navigation Trs.* v. *Laird & Son*, 1883, 10 R. (H.L.) 77; *Graham* v. *Irving*, 1899, 2 F. 29; *Middleton* v. *Tough*, 1908 S.C. (J.) 32; 5 Adam 485; *Walker's Trs.* v. *Lord Advocate*, 1912 S.C. (H.L.) 12.

[2] *Clyde Navigation Trs.* v. *Laird & Son, supra*; 20 S.L.R. 869; *Graham* v. *Irving, supra*; 37 S.L.R. 28; 7 S.L.T. 182; *Middleton* v. *Tough, supra*; 45 S.L.R. 605; 15 S.L.T. 991; *Walker's Trs.* v. *Lord Advocate, supra*; 49 S.L.R. 73; 1911, 2 S.L.T. 455.

[3] *Johnstone* v. *M'Kenzie's Exrs.*, 1835, 14 S. 106.

[4] *Paterson* v. *Macqueen and Kilgour*, 1866, 4 M. 602.

SECTION 31.—CONTRA NON VALENTEM AGERE NON CURRIT PRÆSCRIPTIO.

1238. "Prescription does not run against one who is not able to act in defence of his rights." Prescription (and any loss arising therefrom) is considered as the penalty of negligence, and therefore it does not run against a minor or pupil, nor against an insane person, nor one who is prevented from claiming or defending his rights by imprisonment abroad. But mere absence abroad for business or pleasure does not bar the currency of prescription; nor does the absence of an outlaw, for an outlaw has lost all his legal privileges by his outlawry. This maxim is properly applicable to the long prescription, for it has no application in the shorter prescriptions, such as the triennial prescription of debts or sexennial prescription of bills.[3] See PRESCRIPTION.

SECTION 32.—CUJUS EST COMMODUM EJUS DEBET ESSE PERICULUM.

1239. "He who reaps the advantage should bear the risk." On this principle the risk of a subject purchased, but still in the hands of the seller, formerly lay with the purchaser. As he reaped any advantage to be derived from the subject, either by accretion or otherwise, so he had to bear the risk of loss through deterioration or accident.[4] This principle was not, however, of universal application, for in commodate, the borrower, who has all the advantage, bears none of the risk attendant upon the subject. Its deterioration, or accidental loss, falls upon the lender, the owner of the subject, according to the maxim *Res perit suo domino*.[5] See LOAN.[6]

SECTION 33.—CUJUS EST DOMINIUM EJUS EST PERICULUM.

1240. "The risk lies upon the owner of the subject." This maxim often appears in the form *Res perit domino*. In commodate, in deposit, in pledge, in location, and other contracts, the risk lies with the owner, who bears the loss accidentally occasioned, or any deterioration arising from accident or ordinary use. Injury done to the subject, through the fault of the person in actual possession, must be made good to the owner; for such injury is not one of the risks which he runs, he being entitled to rely on the care and ordinary skill of the actual possessor.[7]

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[1] Trayner, Latin Maxims, p. 104.

[2] Vol. VIII. p. 19, *ante*.

[3] *Harvie* v. *Robertson*, 1903, 5 F. 338.

[4] *Hansen* v. *Craig & Rose*, 1859, 21 D. 432.

[5] See also next para.

[6] P. 305, *ante*.

[7] *M'Intyre* v. *Clow*, 1875, 2 R. 278; *Richardson* v. *Dumfriesshire Road Trs.*, 1890, 17 R. 805; *Brewer* v. *Duncan & Co.*, 1892, 20 R. 230.

This is now the rule of law with regard to the risk attaching to goods sold but not delivered.[1] As to the meaning of *dominus*, reference should be made to the opinion of Lord President Inglis in the case undernoted.[2]

SECTION 34.—CUJUS EST SOLUM, EJUS EST USQUE AD CŒLUM.

1241. "He who is proprietor of land is proprietor also of everything on it." All buildings, all natural fruits, and everything above as well as below the surface belong to the owner of the land. Cf. *Ædificatum solo cedit.*[3] The right of proprietorship *usque ad cælum* has been limited by the Air Navigation Act of 1920, which gives aircraft a right of free passage over the subjacent land.[4]

SECTION 35.—CULPA CARET QUI SCIT SED PROHIBERE NON POTEST.

1242. "He is free from fault who knows but cannot prevent." If one stands by and sees a rape committed without rendering assistance to the person assaulted, he may be indicted as guilty of the crime, actor or art and part;[5] but if he is himself overpowered and unable to render assistance, he is free from fault. So also a soldier ordered by his superior officer to fire upon a mob may know that the order is wrong, and yet incur no fault by firing, as his first duty is obedience, and he cannot prevent the order being carried out.

SECTION 36.—CULPA LATA DOLO ÆQUIPARATUR.

1243. "Gross fault is equivalent to bad intention or fraud." This maxim is generally applied to questions of civil liability: the term *dolus* being then understood as equivalent to bad intention or gross fault. The civilian distinction between *culpa lata*, *culpa levis*, *culpa levissima* is still recognised in the law of Scotland.[6] The person guilty of such fault is liable for the consequences of it, provided the person injured thereby has not himself been also guilty of contributory negligence or fault. In a civil action this neglect of duty involves a liability as extensive as if the owners or lessees had intentionally supplied bad and insufficient apparatus. So, again, trustees who have through their gross fault or negligence allowed the property entrusted to them to be lost or deteriorated, are liable to the beneficiaries in restitution or compensation, just as if they had fraudulently disposed of the estate. An instructive illustration of this maxim will be found in the judgment of Lord Ardmillan, in the case of *Faulds* v. *Townsend*.[7] In criminal actions gross fault or neglect of duty is regarded as equivalent, to some extent, to criminal intention. The commonest illustration of this maxim as applied in the criminal law is found in the prosecution of drivers of motor vehicles for culpable homicide, where there is of course no question of deliberate intent to kill, and the essence of the charge is their reckless culpability in the conduct of their vehicles.

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[1] 56 & 57 Vict. c. 71, s. 20.

[2] *Duchess of Hamilton's Trs.* v. *Fleming*, 1870, 9 H.L. 329, at p. 334.

[3] Para. 1212, *supra*.

[4] 10 & 11 Geo. V. c. 80, s. 9 (1).

[5] *Kerr*, 1871, 2 Coup. 336.

[6] *Wernham* v. *M'Lean, Baird & Neilson*, 1925 S.C. 407, per Lord Anderson at p. 422.

[7] 1861, 23 D. 437.

SECTION 37.—CULPA TENET SUOS AUCTORES.

1244. "Liability for fault attaches only to its author." A maxim in the law of delict, distinguishing it from contract, in which latter a person is liable not only for his own acts but also for those of his agent. Authority to act for another person does not, with the important exception of the case of master and servant, involve that person in liability for delict committed by the person authorised.[1] There is no representation in delict. A husband, for instance, is not liable for a wrong committed by his wife,[2] nor a servant liable for his employer.[3] See NEGLIGENCE; REPARATION. The author of a wrong, however, may be not the actual doer of the damage, but someone on whose instructions he is acting. Thus where a proprietor instructs a contractor to carry out operations on his premises which must necessarily injure his neighbour, he who instructs the work is the true wrongdoer and not he who performs it.[4]

SECTION 38.—CUM NOTA.

1245. "With a mark, or reservation." Formerly when witnesses were disqualified by reason of agency, or partial counsel, etc., it was a frequent practice to admit persons as witnesses who were in some measure chargeable with the disqualification, and especially so where there happened to be *penuria testium*. They were admitted, however, *cum nota*, that is, with a mark to call the attention of the judge to the extent of agency, etc., which had been proved against them, and with a reservation to him to give such weight to their evidence as under the circumstances he should think proper. In effect, the evidence of a witness admitted *cum nota* generally received as much weight as the evidence of those who were not so distinguished.[5]

SECTION 39.—DAMNUM INFECTUM.

1246. "Damage not yet occasioned, but apprehended." Such is damage threatened to buildings from mining operations below them; or violence threatened against the person. The former may be stopped by interdict, the latter provided against by a petition for law-burrows.[1] *Damnum infectum* is used in contrast to *damnum factum*—damage or injury already done.[2]

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[1] *Kieffer* v. *Le Séminaire de Quebec*, [1903] A.C. 85, at p. 97; *Conway* v. *Dalziel*, 1901, 3 F. 918.

[2] *Scot* v. *Banks*, 1628, Mor. 6015; *Mullen* v. *White*, 1881, 18 S.L.R. 493; *Milne* v. *Smiths*, 1892, 20 R. 95; *Barr* v. *Neilsons*, 1868, 6 M. 651.

[3] *Kinloch* v. *Clark*, 1865, 4 M. 107, at p. 112.

[4] *Conway* v. *Dalziel*, 1901, 3 F. 918, at p. 921; *Bower* v. *Peate*, 1876, 1 Q.B.D. 321, at p. 328; *Miller* v. *Renton*, 1885, 13 R. 309; *Cameron* v. *Fraser*, 1881, 9 R. 26.

[5] Lord Trayner's Latin Maxims.

SECTION 40.—DEBITOR NON PRESUMITUR DONARE.

1247. "A debtor is not presumed to make a gift." As a necessary consequence of the presumption against donation, there arises yet a stronger—*Debitor non presumitur donare*: for where a debtor gives money or food, or grants bond to his creditor, the natural presumption is that he means to get free from his obligation, and not to make a present unless donation be expressed.[3] Neither this maxim nor the maxim *donatio non presumitur* states the presumption correctly. The principle is not merely that there is no presumption in favour of donation, but that there is a presumption against it.[4] See DONATION.[5]

SECTION 41.—DELEGATUS NON POTEST DELEGARE.

1248. "A delegate cannot transfer a duty or power conferred on him by another" without the consent of the principal. This maxim merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has undertaken personally to fulfil, and as confidence in the particular person employed is not the proof of the contract of agency, such authority cannot be implied as an ordinary incident in the contract.[6] With the exigencies of business this rule, which was formerly very strictly interpreted, has become subject to exceptions; but it still prevails wherever personal trust is conferred upon the mandatory on account of his personal service, discretion, or confidential relation.[7] Persons appointed to judicial office, whether in the superior or inferior Courts, have no power to delegate their authority, unless the power is expressly conferred upon them in their commission or by statute.[8] Corporations and other public bodies cannot transfer their authority to a committee of their own number in such a way as to amount to an abandonment or delegation of their authority, but must maintain and actually exercise a general control over the actings of the committee,[9] and when quasi-judicial powers are conferred on a committee of a municipal corporation they cannot delegate to a sub-committee to exercise their powers.[10] Where by the articles of association the directors of a company are vested with the power of allocating shares, they cannot, in the absence of express power to do so, delegate their power to a committee.[1] Nor can railway companies or other corporations, who have had conferred on them the power to exercise certain rights and privileges, transfer them to another body without parliamentary authority.[2] At common law trustees have no power to delegate their power to other persons, and in the absence of power conferred upon them by the deed they cannot assume new trustees. Their power is, however, now conferred upon them by statute.[3] See DELECTUS PERSONÆ.[4]

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[1] See p. 53, *ante*. [2] *Singer Manufacturing Co.* v. *Kimball & Morton*, 1873, 11 M. 267.

[3] Ersk. iii. 3, 93; see Stair, i. 8, 2; *Johnstone* v. *Haviland*, 1896, 23 R. (H.L.) 6, per Lord Herschell at p. 9.

[4] Dickson on Evidence, i. 132, note; 139, note; *British Linen Co.* v. *Martin*, 1849, 11 D. 1004, per Lord Fullerton at p. 1008; *Heron* v. *M'Geoch*, 1851, 14 D. 25 at p. 30, *per idem*.

[5] Vol. VI. p. 54, *ante*.

[6] *De Bussche* v. *Alt*, 1877, 8 Ch. D. 286 at p. 310.

[7] *Speight* v. *Gaunt*, 1883, 9 App. Cas. 1.

[8] *Lord Advocate* v. *Sinclair*, 1872, 11 M. 137; cf. *Gillespie* v. *Young*, 1861, 23 D. 1357.

[9] *Osgood* v. *Nelson*, 1872, L.R. 5 H.L. 636.

[10] *Thomson* v. *Dundee Police Commrs.*, 1887, 15 R. 164.

SECTION 42.—DE MINIMIS NON CURAT PRÆTOR.

1249. "The prætor does not concern himself about trifles," or, in other words, does not grant an equitable remedy in a matter of no moment. The remedies of the prætorian law were granted, and could be resorted to, only where the grievance was considerable. The maxim, which is imported from the civil law into the law of Scotland, is frequently written *De minimis non curat lex.* In this form, as in its other form, it has important applications. It is, for example, fundamental in the law of nuisance. In order to constitute a nuisance there must be proof of substantial inconvenience or discomfort. It was said by Lord Selborne in one case: "The word 'material' is of great importance; it excludes any sentimental, speculative, trivial discomfort, or personal annoyance of that kind—a thing which the law may be said to take no notice of, and have no care for." [5] In the same case Lord Bramwell observed: "The word 'material' is one used continually in endeavouring to explain to a jury what it is which would constitute a nuisance, as distinguished from something which might indeed be perceptible, but is not of such a substantial character as to justify the interference of the Court, or allow the maintenance of an action in conformity with the legal maxim, *Lex non favet delicatorum votis.*" [6]

SECTION 43.—DE NON APPARENTIBUS ET NON EXISTENTIBUS EADEM EST RATIO.

1250. "The same rule is applied to things which do not appear, and to things which do not exist." Things which do not appear (*i.e.* are not produced or proved) are regarded as non-existent. This rule is of frequent application, and in various forms. Thus, if a litigant requires, for the purposes of maintaining his right to the possession of some lands, to found upon a deed or document, it (or such equivalent as the law permits, as, for example, a decree of proving the tenor) must be produced or recovered by him, as otherwise the Court must decide the question before it as if the deed or document never existed; the Court cannot assume that the deed existed, or that its terms were as averred, if these matters are disputed. So, again, if parties have entered into a written contract, the party seeking to enforce it must produce it (or its equivalent) before he can succeed. Further, if parties have entered into a bargain which has been reduced to writing, the terms of the bargain can only be ascertained from the writing itself, which cannot be modified or affected by previous communings or negotiations. As the written bargain is considered the expression and statement of the ultimate agreement of the parties, what does not appear there is treated as if it had never been suggested, or had not existed. Everything of which the Court can take no notice judicially is regarded, for the purposes of the particular case, as non-existent.[1] Thus in a discussion on a bill of exceptions, the Court can take no notice of anything which occurred at the trial which does not appear on the bill itself.

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[1] *Harris* case, 1872, L.R. 7 Ch. 587.

[2] *Great Northern Rly. Co.* v. *Eastern Counties Rly. Co.*, 1852, 21 L.T. (Ch.) 837.

[3] Trusts (Scotland) Act, 1861 (24 & 25 Vict. c. 84), s. 1; Trusts (Scotland) Act, 1921 (11 & 12 Geo. V. c. 58), s. 3.

[4] Vol. V. p. 519, *ante.*

[5] *Fleming* v. *Hislop*, 1886, 13 R. (H.L.) 43, at p. 45.

[6] *Ibid.*, at p. 87; cf. *M'Neill* v. *Mackenzie*, 1870, 8 M. 520; Rankine, Land-Ownership, 4th ed., pp. 462, 549.

SECTION 44.—DERIVATIVA POTESTAS NON POTEST ESSE MAJOR PRIMITIVA.

1251. See *Assignatus utitur jure auctoris.*[2]

SECTION 45.—DIES DOMINICUS NON EST JURIDICUS.

1252. The Lord's day (Sunday) is not a day for judicial proceedings.[3]

SECTION 46.—DIES INCEPTUS PRO COMPLETO HABETUR.

1253. "A day commenced is held as completed."[4] See TIME (COMPUTATION OF).

SECTION 47.—DIES INCERTUS PRO CONDITIONE HABETUR.

1254. "An uncertain event is held as a condition." If an obligation is undertaken to be performed at a certain date which is sure to come, the mention of the date does not make the obligation conditional but only postpones the performance of it. But, on the other hand, if the date is uncertain or may never occur, such as the date of a person attaining majority, which he may never do, the maxim applies, and the obligation is held as conditional.[5] While the maxim was originally applied to cases of contract, it has come to be recognised in the law as to vesting. If in a trust deed a gift is made in the form of a direction to pay at a person's majority or the occasion of some other uncertain event, vesting is postponed; but if there is an unqualified gift followed by a direction to pay at majority or at some other date, vesting is not postponed.[1] See VESTING IN SUCCESSION.

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[1] *Espie* v. *British Basket Co.*, 1920 S.C. 655; *Wilson* v. *Lyle*, 1925 S.C. 824.

[2] Para. 1221, *supra.*

[3] *M'Niven* v. *Glasgow Corporation*, 1920 S.C. 584.

[4] *Parish Council of Cavers* v. *Parish Council of Smailholm*, 1909 S.C. 46; *Simpson* v. *Melville* (O.H.), 1899, 6 S.L.T. 355.

[5] Bell's Prin., s. 47.

SECTION 48.—DIES INTERPELLAT PRO HOMINE.

1255. "The day interferes, or makes the demand, on behalf of the man." The meaning of this maxim is that where fulfilment of an obligation is due on a certain day, the arrival of the stipulated day is itself deemed a sufficient demand on the part of the creditor; and, by failing to fulfil on that day, the debtor is *in mora*, and becomes liable in the consequences.[2]

SECTION 49.—ENUMERATIO UNIUS EST EXCLUSIO ALTERIUS.

1256. "The special mention of one thing implies the exclusion of another"; or, the special mention of one thing operates to the exclusion of anything different from that expressed. This is a rule observed in the construction of writs, or Acts of Parliament, and its meaning will be best explained by giving instances of its application. In a deed of entail it is sufficient if the entailer in the irritant and resolutive clauses declares the forfeiture of the right of the heir in possession to arise in the event of his contravening any of the cardinal conditions or limitations of the entail, and so long as the clauses remain general in their terms, the deed will be effectual and binding on the heirs. But if the entailer proceeds in these clauses to enumerate the several conditions and limitations, and omits any of them, the entail will be ineffectual, the expression of some of the cardinal conditions, on the principle of this maxim, operating as an exclusion of those not mentioned. The case of *Rennie* v. *Horne*[3] affords a good example of this. In that case the cardinal conditions were all set forth, but the irritant clause ran thus: "And in case the said A. H., or any of the heirs of tailzie before mentioned, shall contravene or fail in performing any part of the premises, particularly by," etc., and then followed an enumeration of the conditions of the entail, but omitting special mention of the prohibition against selling. The entail was held to be ineffectual, because the special enumeration of cases in which forfeiture was to follow did not contain any reference to a sale by the heir, and the enumeration excluded the effect of the general clause which preceded it, and which would certainly have been sufficient if it had not been followed, and therefore governed by the particular enumeration. On the other hand, see the case of the *Earl of Kintore*,[4] where the general provision was held not to be restricted by the special enumeration on the ground that the words relied on as inferring restriction were used as words of reference, and operated as a repetition of the general clause. The maxim is also applied in the construction of statutes.[1]

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[1] M'Laren on Wills, p. 796.

[2] Stair, i. 3, s. 7; i. 17, ss. 15, 18.

[3] 1838, 3 S. & M'L. 142.

[4] *Earl of Kintore* v. *Lord Inverury*, 1863, 4 Macq. 520.

SECTION 50.—EODEM MODO QUO QUID CONSTITUITUR, EODEM MODO DISSOLVITUR.

1257. "Any obligation is solved or extinguished in the same manner as that by which it was constituted." If an obligation has been constituted verbally it may be verbally discharged: and it is a general rule (although not without exception) that rights constituted by writing should be extinguished by writing. "The same solemnities that are requisite to a deed which creates an obligation are necessary in a written discharge of it." [2] In treating of the extinction of obligations constituted by written instruments, Mr. Menzies says: "At a former period it was the practice, upon performance of an obligation, to rest satisfied with the cancellation of the instrument instructing it. This is not to be relied upon, however, as an effectual discharge. In a bond for money, the fact of payment cannot be proved by parole evidence, and there is, therefore, no available proof of the payment, while, although the bond be destroyed, the tenor of it may be proved; and however improbable such a thing may appear at the time, a change of circumstances may arise producing effects not now anticipated."[3] In practice, bills, promissory notes, and letters of guarantee are not generally discharged in any other way than by delivery thereof to the obligant or cautioner; but with the exception of these, all other written instruments constituting obligation are not only delivered up, but are accompanied by a written discharge of the obligation when that has been fulfilled or departed from. Among the Romans the rule expressed by this maxim was very strictly applied; so much so, that the very same words were used in discharging an obligation (where it was one constituted *verbis*) as those which were made use of in its constitution. Rights constituted by use are discharged or extinguished by non-use. So, for example, vicarage teinds, the right to which is constituted by usage, may be extinguished by non-usage, "or by disuse in payment." [4] Servitude rights, such as a right-of-way acquired by use for more than forty years, may be lost in like manner by a discontinuance of the use for a like period.

SECTION 51.—EX DOLO MALO NON ORITUR ACTIO.

1258. "A right of action cannot arise out of fraud." A pursuer must come into court "with clean hands," [5] and will not be allowed to take advantage of his own wrongful act. This maxim is closely allied to the maxims *Ex turpi causa non oritur actio* and *Alegans suam turpitudinem non est audiendus.*[1] See ILLEGAL AND IMMORAL CONTRACTS.[2] The Courts will refuse to entertain an action for implement of an unlawful contract or of any incidental right arising under it. They will decline to assist a pursuer who founds upon a contract which is impeachable upon the ground of dishonesty or as being forbidden by law or public policy.[3]

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[1] *Henry* v. *M'Ewan*, 1834, 7 W. & S. 432; *Stevenson* v. *Hunter*, 1903, 6 F. 761; *Inverness-shire County Council* v. *Mags. of Inverness*, 1909 S.C. 386.

[2] Ersk. iii. 4, 9; but cf. *Leith* v. *Leith*, 1848, 10 D. 1137; 1 Ross L.C. (L.R.) 691.

[3] Menzies, Convey., p. 269.

[4] Ersk. iii. 7, 13.

[5] *Petrie* v. *Hannay*, 1789, 3 T.R. 418, per Lord Kenyon at p. 422.

SECTION 52.—FALSA DEMONSTRATIO NON NOCET.

1259. "An erroneous description (of a person or a subject) does not injure." Thus a legacy is valid although there may be an error in naming or describing the legatee—*dummodo constet de persona*—provided it be evident, from the whole circumstances, who is the individual meant.[4] For example, in one case a legacy in favour of "my late brother James's son" was, in the circumstances of the case, held effectual to the only child of James, who was a daughter.[5] A testator left a legacy to his niece E., and "to each of the other three" children of his brother J. £2000. J., however, left four children other than E.; and it was held that the legacy was effectual to the whole four other children of J.[6] Similarly, if there be a wrong description of the subject bequeathed, this does not void the bequest, provided there is no doubt as to the thing intended to be specified.[7] See LEGACIES.[8]

SECTION 53.—FRUSTRA PETIS QUOD MOX RESTITURUS ES.

1260. "You seek in vain that which you must immediately restore." This sometimes appears as *Frustra petis quod statim alteri reddere cogeris.* Compensation or set-off proceeds upon the principle of this maxim, as the defender, if he were decerned to pay the pursuer the sum sued for, could compel him to repay it under a new action. Compensation, however, depends in Scotland upon statute, and not upon the common law. The debts to which compensation applies must be liquid, or capable of immediate liquidation, and there must be *concursus debiti et crediti.*[9]

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[1] See *Hermann* v. *Charlesworth*, [1905] 2 K.B. 123, per Collins M.R. at p. 131.

[2] Vol. VIII. p. 29, *ante*.

[3] *Holman* v. *Johnson*, 1775, 1 Coup. 341, per Lord Mansfield at p. 343.

[4] M'Laren, Wills and Succession, i. 336 *et seq.*; Craigie, Conveyancing (Mov.), 2nd ed., p. 534.

[5] *Macfarlane's Trs.* v. *Henderson*, 1878, 6 R. 288.

[6] *Bryce's Tr.*, 1878, 5 R. 722; see also *Millar's Trs.* v. *Rattray*, 1891, 18 R. 989; *Lord Lovat* v. *Fraser*, 1884, 11 R. 1119; *Johnstone's Exrs.* v. *Johnstone*, 1902, 10 S.L.T. 42; *Jaffrey's Trs.* v. *Society for Prevention of Cruelty to Animals*, 1903, 10 S.L.T. 651; *M'Growther's Trs.* v. *Lord Advocate*, 1907, 15 S.L.T. 652.

[7] *Bruce's Trs.* v. *Bruce*, 1875, 2 R. 775; *Wright's Trs.* v. *Wright*, 1870, 8 M. 708; *Jamieson's Trs.* v. *Jamieson*, 1899, 2 F. 258; *Young's Trs.* v. *Young*, 1901, 3 F. 616; *Russell's Trs.* v. *Palmer*, 1901, 9 S.L.T. 321.

[8] P. 103, *ante*.

[9] Act 1592, c. 143; see COMPENSATION, Vol. IV. p. 151, *ante*.

SECTION 54.—FRUSTRA PROBATUR QUOD PROBATUM NON RELEVAT.

1261. "It is useless to prove that which, when proved, is not relevant to the question at issue." This requires no illustration by authority.

SECTION 55.—FUNCTUS OFFICIO.

1262. "Having discharged his official duty." This is said of anyone holding a certain appointment when the duties of his office have been discharged. Thus a judge, when he has decided a question brought before him, is *functus officio*, and cannot review his own decision. So is an arbiter, when he has issued his decree-arbitral.[1]

SECTION 56.—GENERALIA SPECIALIBUS NON DEROGANT.

1263. "General statements or provisions do not derogate from special statements or provisions." This maxim expresses a general rule of construction which applies both to deeds and to statutes. Where a deed contains provisions of a general nature and others which are special, the special may limit the application of the general to matters *ejusdem generis* with those enumerated, but they are never limited or explained by the general provisions. The rule applies to all deeds whether unilateral, *e.g.* wills or deeds of settlement, or contracts.[2] It also applies to statutes. "Where general words in a late Act are capable of reasonable and sensible application, without extending them to subjects specially dealt with by earlier legislation, that earlier and special legislation is not held to be indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so."[3] The later statute is presumed to have only general cases in view and not particular cases already provided for.[4]

SECTION 57.—ID CERTUM EST QUOD CERTUM REDDI POTEST.

1264. "That is regarded as fixed or ascertained which can be determined." Thus, in the contract of sale it is essential that there shall be a certain price agreed upon by the parties, but it is not essential that the price shall be precisely fixed at the time, it being sufficient that it can be settled by reference to some determinate standard, or by reference to a third party.[5]

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[1] *Moncreiffe* v. *Perth Police Commrs.*, 1886, 13 R. 921; *MacGown* v. *Cramb*, 1897, 24 R. 481; *Torry* v. *Torry*, 1919, 1 S.L.T. 151.

[2] See *Earl of Kintore* v. *Lord Inverury*, 1863, 4 Macq. 520, per Westbury L.C. at p. 522; M'Laren on Wills, i. 339.

[3] *Seward* v. *The Vera Cruz*, 1884, 10 App. Cas. 59, per Selborne L.C. at p. 68; cf. *Hawkins* v. *Gathercole*, 1855, 6 De G.M. & G. 1, at p. 31; *Thames Conservators* v. *Hall*, 1868, L.R. 3 C.P. 415, per Bramwell B. at p. 421; *Aberdeen Suburban Tramways Co.* v. *Magistrates of Aberdeen*, 1927 S.C. 683.

[4] Maxwell on Interpretation of Statutes, 7th ed., p. 153.

[5] *Lavaggi* v. *Pirie & Sons*, 1872, 10 M. 312.

SECTION 58.—IGNORANTIA JURIS NEMINEM EXCUSAT.

1265. "Ignorance of the law excuses no one." A person may plead ignorance of the fact, but not ignorance of the law.[1] This may be stated too broadly, as in certain cases parties acting in ignorance of their legal rights may be reponed against the consequences of their ignorance.[2] Ignorance of the law can never be a good ground of defence to a criminal charge, unless the offence is one arising out of contract, express or implied, *e.g.* prosecutions under the Tramways Act, 1870, or Railway Companies by-laws for travelling without a ticket, where an attempt to cheat must be proved.[3]

SECTION 59.—INTEREST REIPUBLICÆ UT SIT FINIS LITIUM.

1266. "It is the interest of the state that there should be an end to litigation." In all states the law has affixed a final and unchallengeable character to certain sentences or decrees, called formerly in Roman law and now in Scotland *res judicatæ*. The effect of a sentence of this character is to exclude all rehearing or review, whether by the Court which pronounced the judgment in the previous action or by any other Court.[4] See RES JUDICATA. The rule is one of public policy.[5]

SECTION 60.—JUS IN RE; JUS AD REM; JUS IN REM; JUS IN PERSONAM.

1267. These expressions denote a distinction, which is of great importance in practical jurisprudence, between rights available against all persons indefinitely and rights available only against a definite individual or individuals. He who has a *jus in re*, *e.g.* the owner of a subject, has a right to its exclusive enjoyment, which he can make good against everybody. He who has a *jus ad rem*, *e.g.* a servant having a right to wages, has a claim only against a definite individual, his master. The same distinction is denoted by the terms *jus in rem* and *jus in personam*. These latter terms are undoubtedly more descriptive, and are also analogous to the description of judgments, as being *in rem* or *in personam*, and to the mediæval distinction between *statuta realia* and *statuta personalia*, which played so great a part in the development of international private law. In Scotland, however, the terms *jus in re* and *jus ad rem* are used more frequently. Although the expression *jus in re* is classical,[6] the terms *jus in re* and *jus ad rem* were first used to express this distinction by the canon law. A *jus in re* is properly a "real" right; a *jus ad rem*, a "personal" right.[1]

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[1] *Stewart* v. *Kennedy*, 1890, 17 R. (H.L.) 25.

[2] *Stewart* v. *Bruce's Trs.*, 1898, 25 R. 965.

[3] Macdonald, Criminal Law, 4th ed., p. 2; *Nimmo* v. *Lanarkshire Tramways Co.*, 1912 S.C. (J.) 23; 6 Adam 571; *Thom* v. *Caledonian Rly. Co.*, 1886, 14 R. (J.) 5; 1 White 248.

[4] Ersk. iv. 3. 1.

[5] See *Lockyer* v. *Ferryman*, 1877, 4 R. (H.L.) 32, per Lord Blackburn at p. 42.

[6] See *e.g.* Dig. 39, 2, 19.

SECTION 61.—LEX NON COGIT AD IMPOSSIBILIA.

1268. "The law does not have regard to what is impossible." It was formerly considered that this maxim "referred exclusively to the remedy for failure, excluding any demand for specific implement but leaving the party in default liable in damages. Impossibility might be a defence in the case of obligations, imposed by law independently of contract: it did not affect the liability of a party on an obligation he had voluntarily undertaken."[2] In more modern times the tendency has been to establish the rule that continued possibility is in general an implied condition of the contract, and that supervening impossibility involves its dissolution or avoidance. The existing state of the law is thus summarised by Professor Gloag: "The supervening impossibility of performance of any material obligation under the contract, not due to the act of either of the parties, but arising from circumstances beyond the control of either, avoids the contract. The tendency of recent cases has been to apply the same rule when supervening events have left performance indeed possible, but possible only under such altered conditions as would, had they been foreseen, have prevented the parties, as reasonable persons, from entering into the contract, or agreeing to the particular terms. The law now recognises that while it is possible for parties to bind themselves to perform some particular act, no matter what may happen, it is rarely their intention to do so, and that to enforce performance after a material change of circumstance would often be to bind the parties to a contract which they did not intend to make."[4] See CONTRACT.[5] As to contracts to do something which is contrary to law, see ILLEGAL AND IMMORAL CONTRACTS.[6]

SECTION 62.—MALITIA SUPPLET ÆTATEM.

1269. "Malice supplies the place of age." A child still in pupillarity committing a crime is not amenable to the ordinary punishment inflicted upon adults for its commission, because the law presumes that the child acts in ignorance, and that there is thus wanting the criminal intention which forms the essence of every crime. At common law the legal presumption might be redargued, and criminal intention so proved supplied the place of age.[7] The rule of the common law has now been modified by statute. A child under seven years of age is not liable to punishment as a criminal. Children above that age may be prosecuted and punished in manner prescribed by the Children Act, 1908. Children under fourteen years of age cannot be sentenced to imprisonment or penal servitude, and a young person between the ages of fourteen and sixteen cannot be sentenced to penal servitude. Sentence of death is incompetent on an accused who has not reached the age of sixteen at the date of sentence.[1] See CRIME.[2]

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[1] Ersk. Inst. iii. 1, 2; *cf.* also *Administrator of Austrian Property* v. *Von Lorang*, 1927 S.C. (H.L.) 80.

[2] Gloag, Contract, 2nd ed., p. 346; *cf.* Stair, i. 1710; Ersk. iii. 3, 86; Bell's Prin., s. 29.

[3] *Blackburn Bobbin Co.* v. *Allen*, [1918] 1 K.B. 540; [1918] 2 K.B. 467, per M'Cardie J.; *Bank Line* v. *Capel*, [1919] A.C. 435, per Lord Haldane; *Leiston Gas Co.* v. *Leiston Urban Council*, [1916] 2 K.B. 428, per Scrutton L.J.

[4] Gloag, Contract, 2nd ed., pp. 346–347.

[5] Vol. IV. p. 457 *et seq.*

[6] Vol. VIII. p. 19, *ante*.

[7] See *Fulton*, 1841, 2 Swin. 564.

SECTION 63.—MELIOR EST CONDITIO POSSIDENTIS VEL DEFENDENTIS.

1270. This maxim means that the position of the possessor of a subject, concerning the right to which there is a dispute, is better than that of the person who challenges his right of possession by claiming the subject. The onus is on the challenger to establish a title to the subject; the possessor need not do so; and the title established by the challenger must be better than that on which the possessor holds. The maxim is of practical importance in questions of interim regulation of possession in interdict proceedings.[3]

SECTION 64.—MESSIS SEMENTEM SEQUITUR.

1271. The doctrine that the person who sows the crop is entitled to reap it is expressed by the Latin maxim, *Messis sementem sequitur*. This maxim is chiefly applicable in questions between owner and *bona fide* possessor, heir and executor, fiar and liferenter's representative. In cases of *bona fide* possession it implies that, if the possessor have sown the ground while his *bona fides* continued, he has the right to reap the crop, even if he should discover before reaping it that another has a preferable title to the land.[4] On the same principle, the crop which a deceased person has sown belongs not to his heirs, but to his executors.[5] Similarly, if a liferenter had sown land of which he was in the natural possession, his representatives are, on his death, entitled to the whole crop without payment of any rent to the fiar.[6] In the case of a liferent lease, if the liferenter die between the sowing and the reaping of the ground his representatives will be entitled to the crop on paying a proportion of the rent.[7] The maxim holds good in parochial law where the glebe has been sown prior to the minister's death, for in this case his representatives are entitled to the crop. On the same principle, in cases of translation or deprivation the minister who has *bona fide* sown the crop has the right to reap it. Where a glebe, which has been let, is sown prior to the vacancy, or at least prior to the induction of the new incumbent, the tenant is entitled to the crop,[1] and the late minister's representatives are entitled to the rent.[2]

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[1] Hume on Crimes, i. 35; Alison, Criminal Law, i. 666; Children Act, 1908 (8 Edw. VII. c. 67, ss. 102–107); Macdonald, Criminal Law, 4th ed., p. 11.

[2] Vol. V. p. 48, *ante*.

[3] *General Assembly of Free Church of Scotland* v. *Johnston*, 1908, 7 F. 817; *Brodie* v. *Earl of Dalhousie's Trs.* (O.H.), 1895, 3 S.L.T. 150; *Adams* v. *Mags. of Glasgow*, 1868, 40 S.C. (J.) 524; 5 S.L.R. 591.

[4] Ersk. Inst. ii. 1, 26; Rankine, Land-Ownership, 4th ed., p. 84.

[5] Stair, ii. 1, 2.

[6] Ersk. Inst. ii. 9, 65; Bell's Prin., s. 1045; Rankine, Land-Ownership, 4th ed., p. 736; *M'Math* v. *Nisbet*, 1621, Mor. 15877; *Guthrie* v. *Laird of Mackerston*, 1671, Mor. 15891; *Cockburn* v. *Brown's Trs.*, 1748, Mor. 15911.

[7] Rankine, Leases, 2nd ed., p. 527; *Stewart* v. *Grimmond's Repr.*, 1796, Mor. 13853.

1272. What is included under the term "*messis*" is not quite certain. The maxim undoubtedly applies to annual industrial fruits which require yearly seed and industry, as wheat, barley, and artificial hay of the first crop. Just as certainly it does not apply to trees and natural fruits not requiring seed and cultivation. But it is doubtful how far it applies to hay of the second crop and to nursery plants. These two kinds of crop would certainly be treated as industrial fruits in questions between landlord and tenant, but in a question of succession authorities differ as to whether heir or executor would be preferred.[3]

Section 65.—Mobilia situm non habent: Mobilia sequuntur personam.

1273. "Moveables follow the person." By a legal fiction, moveables are always regarded as having no locality of their own, but as being situated in that place where their owner has his domicile. Thus if a Scotsman having moveable property situated in Scotland be domiciled in England at the time of his death, the succession thereto will be regulated by the law of England,[4] and on the same principle a deed of transference of moveables executed according to the law of the domicile will be held effectual to convey moveables situated in a country where such a mode of conveyance would not be effectual.[5] The payment of death duties on personalty is also settled upon the principle of this phrase; for if the deceased be domiciled within the kingdom at the time of his death, the duty is exigible without regard to the place where the personalty is situated, but if he be domiciled outwith the kingdom, no duty is exigible, although the whole of his moveable estate should be situated within it.[6]

Section 66.—Nemo debet bis puniri pro uno delicto.

1274. "No one should be punished twice for the same offence." Punishment once suffered, the crime is extinguished and a second punishment cannot follow. An offence may, however, entail both civil and criminal consequences, by way of damages to the individual injured as well as punishment by a criminal tribunal.

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[1] Rankine, Leases, 2nd ed., p. 32; Connell, Parishes, p. 435; Johnston's Duncan, Par. Ecc. Law, x.; *Colvil* v. *Lord Balmerino*, 1665, Mor. 464.

[2] *Taylor*, 1853, 2 Stuart 538.

[3] Ersk. Inst. ii. 2, 4; Bell's Prin., s. 1473; Rankine, Land-Ownership, 4th ed., p. 84 *et seq.* Contrast *Sinclair* v. *Dalrymple*, 1744, Mor. 5422; *Wight* v. *Inglis*, 1796, Mor. 5446; *Marquis of Tweeddale*, 19th November 1816, F.C., with *Gordon* v. *Gordon*, 1806, Hume 188; *Keith* v. *Logie's Heirs*, 1825, 4 S. 267; *Lyall* v. *Cooper*, 1832, 11 S. 96.

[4] *North Western Bank* v. *Poynter, Son & Macdonalds*, 1894, 22 R. (H.L.) 1.

[5] *Dinwoodie's Exrx.* v. *Carruther's Exr.*, 1895, 23 R. 234.

[6] *Duncan's Tr.* v. *M'Cracken*, 1888, 15 R. 638; cf. *Mackinnon's Trs.* v. *Lord Advocate*, 1920 S.C. (H.L.) 171.

SECTION 67.—NEMO DEBET BIS VEXARI PRO UNA ET EADEM CAUSA.

1275. "No one ought to be molested twice for one and the same cause." This maxim is applied in Scotland both in criminal and in civil cases. So a prisoner cannot be called upon twice to answer or be tried for the same offence. If he has been put upon his trial and the jury sworn they must return a verdict, and he has then "tholed an assize" and cannot again be put on trial for the same offence. The only exception to this rule is when the trial breaks down through some unforeseen accident for which the prosecutor is not responsible, such as the illness of a juryman or of the accused. See CRIME (PROCEDURE).[1] The same principle applies to civil cases where the plea of *res judicata* is a good defence. See RES JUDICATA. The English doctrine of merger by which the cause of action *transit in rem judicatam* so as to prevent it being the subject of another suit is, however, no part of the law of Scotland.[2]

SECTION 68.—NEMO DEBET ESSE JUDEX IN PROPRIA CAUSA.

1276. "No one ought to be a judge in his own cause." This maxim includes not only those cases in which the judge appears directly as a party, but those also in which he has an interest. In one case [3] a question arose which was sent to the whole Court for opinion, when six of the judges declined on the ground that they had policies of insurance effected over their lives with the defenders' society. Such a ground of declinature has now been removed.[4] The interest of relationship to one of the parties is a sufficient ground of declinature.[5] On the subject of the declinature of a judge, either by a party or the judge himself, see DECLINATURE.[6]

SECTION 69.—NEMO DEBET EX ALIENO DAMNO LUCRARI.

1277. "No one should be enriched out of the loss or damage sustained by another," a maxim of the Roman law, founded upon equity, the principle of which has been adopted by the Scots law. Upon this principle the *negotiorum gestor* recovers that which he has expended on behalf of one who is absent, and unable to guard his own property or manage his own affairs. This maxim also finds application in the case where one builds a house upon ground which he believes to be his own, but which ultimately proves to be the property of another. In such a case the owner of the ground takes the house as an accessory to his land, but he is bound to indemnify the person building *bona fide*, to the extent at least to which he has been benefited by the other's labour and outlay. This maxim is expressed in various forms, as follows: *Nemo debet locupletari aliena jactura : Nemo debet ex aliena jactura lucrari : Nemo debet locupletari ex alterius incommodo*; all meaning, no one should be enriched at another's cost or loss. One other form of the maxim is used by Erskine,[1] *Nemo locupletandus est cum detrimento alterius.*

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[1] Vol. V. p. 247, *ante*.

[2] *Steven* v. *Broady, Norman & Co.*, 1928 S.C. 351.

[3] *Borthwick* v. *The Scottish Widows' Fund*, 1864, 2 M. 595.

[4] 31 & 32 Vict. c. 100, s. 103.

[5] *Campbell* v. *Campbell*, 1866, 4 M. 868; *Wildridge* v. *Anderson*, 1897, 25 R. (J.) 27; *Lord Advocate* v. *Edinburgh Commrs. of Supply*, 1861, 23 D. 933; *Sibbald's Trs.* v. *Greig*, 1871, 9 M. 399.

[6] Vol. V. p. 454, *ante*.

SECTION 70.—OBITER DICTUM.

1278. An opinion given incidentally by a judge upon a point raised in argument, but which it is not necessary to determine for the decision of the case. Such incidental expressions of opinion are not authoritative, the presumption being that they have not been so carefully weighed as the real grounds of judgment. They are, however, valuable, and are frequently cited, their value depending upon the eminence of the judge pronouncing them.

SECTION 71.—OMNIA RITE ACTA PRESUMUNTUR.

1279. "All things are presumed to have been duly done." This is a presumption of law which was formerly of great importance in connection with the transference of heritable property. Thus if an instrument of sasine were properly authenticated and recorded, the law presumed that the ceremony of giving sasine by delivery of the necessary symbols in presence of witnesses as narrated in the same was duly performed, and no objection could be heard to the contrary so long as the instrument of sasine stood unreduced. The presumption applies to notarial instruments that the notarial acts recorded were duly and properly performed. Executions of citation and charge by officers of court and generally all official acts are protected by the same presumption. The presumption may be redargued by proof.[2]

SECTION 72.—OMNIS RATIHABITIO RETROTRAHITUR ET MANDATO PRIORI ÆQUIPARATUR.

1280. "Every ratification operates retrospectively and is equivalent to a prior order or authority." Ratification or homologation places both principal and agent in the same position with regard to acts and contracts as if authority had been given beforehand. See HOMOLOGATION.[3] The ratification by the principal creates rights and liabilities as at the date of the act or contract, not only between the principal and agent, but also between the principal and third parties. See AGENCY;[1] HOMOLOGATION.[2]

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[1] i. 7, 33 ; *cf.* Stair, i. 8, 3 ; *Edinburgh Tramways* v. *Courtenay*, 1909 S.C. 99.

[2] Trayner, Latin Maxims, p. 419.

[3] Vol. VII. p. 623, *ante*.

SECTION 73.—PATER EST QUEM NUPTIÆ DEMONSTRANT.

1281. "He is the father whom the marriage indicates to be so." A child born in lawful wedlock or within ten months of the dissolution of marriage is presumed to be legitimate.[3] The rule laid down in the maxim is merely a *presumptio juris* and may be displaced by evidence shewing that the child could not be the issue of the husband. Thus if it be proved that the husband was impotent, the wife's child will not be held to be legitimate.[4] The presumption will also be overcome if it be proved that the husband was absent from his wife during the whole period within which conception must have taken place.[5] If it be proved that the husband has been absent for more than ten months (authorities differ as to whether these should be lunar or calendar months) before the birth of the child, or has been absent and returned to his wife within six lunar months of the birth of the child, the child is not held to be legitimate. It is thought that the rule in *Russell* v. *Russell*,[6] that the evidence of the spouses is inadmissible to prove non-intercourse after marriage to bastardise a child born in wedlock, never was part of the law of Scotland.[7] The presumption *pater est* applies as to the legitimacy of a child born shortly after the marriage if the husband knew that the woman was pregnant when he married her. The maxim has been held not to apply to a child born out of wedlock whose alleged father afterwards married the mother.[8] See AFFILIATION;[9] LEGITIMATION.[10]

SECTION 74.—PENDENTE LITE NIHIL INNOVANDUM.

1282. In Roman law property became *res litigiosa* as soon as it was the subject of *litis contestatio*. In Scotland the maxim, *Pendente lite nihil innovandum*, is recognised as a principle of common law. After an action or diligence has been begun, and the necessary steps have been taken to secure publication, the defender or debtor cannot defeat the action or diligence which has been instituted against him by alienating the property forming the subject of litigation. If the property in question is alienated, the rights of the pursuer of the action, or of the person using the diligence, are not prejudiced, for the purchaser is bound by any decree pronounced in the action, or takes the property subject to the diligence then in dependence.[1] The manner in which land may be made litigious, and the point of time from which it is reckoned *in rebus litigiosis*, are now matters of express statutory provision. See LITIGIOSITY.[2] This maxim does not strike at an act done or deed granted in fulfilment of a previous obligation. Thus a party who is substantially in right of a ground of action is entitled to found on a deed granted *pendente lite* to complete his formal title.[3] It has long been settled that the maxim "applies only to things done by the debtor or defender in the action which tend to make the right of the creditor or pursuer worse, but cannot hinder the creditor or pursuer from making his right better, even in competition with another creditor or pursuer." [4] In general, litiscontestation takes place when defences are lodged. See LITISCONTESTATION.[5]

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[1] Vol. I. p. 200, *ante*.

[2] Vol. VII. p. 623, *ante*.

[3] Stair, iii. 3, 42; Ersk. i. 649.

[4] *Sandy* v. *Sandy*, 1823, 2 S. 453.

[5] *Brodie* v. *Dyce*, 1872, 11 M. 142; *Steedman* v. *Steedman*, 1887, 14 R. 1066; *Tennent* v. *Tennent*, 1890, 17 R. 1205; *Coles* v. *Homer and Tulloh*, 1895, 22 R. 716.

[6] [1924] A.C. 687.

[7] *Mackay* v. *Mackay*, 1855, 17 D. 497; *Brodie* v. *Dyce*, 1872, 11 M. 142; *Tennent* v. *Tennent*, *supra*; *Robertson* v. *Robertson* (O.H.), 1914, 2 S.L.T. 353; *Coles* v. *Homer and Tulloh*, *supra*; *Burman* v. *Burman* (O.H.), 1930, S.L.T., where the Scots authorities are exhaustively reviewed.

[8] *Innes* v. *Innes*, 1835, 13 S. 1050.

[9] Vol. I. p. 189, *ante*.

[10] P. 137, *ante*.

SECTION 75.—POSTERIORA DEROGANT PRIORIBUS.

1283. "Subsequent enactments repeal prior ones." This maxim is also found in other forms, e.g. *Lex posterior derogat priori; Leges posteriores priores contrarias abrogant*, and as regards deeds, especially wills, *Cum duo inter se pugnantia reperiuntur in testamento ultimum ratum est.* Where two enactments are inconsistent with or repugnant to each other, the later in date prevails. It operates as a repeal of the earlier, even although there is no express clause of repeal. If in the same statute there are inconsistent or repugnant clauses, the later clause rules; but only where the clause retained is consistent with the general purpose of the enactment.[6] The same principle of construction is applied to clauses in wills, for the position of the clauses in the instrument may with some reason be held to correspond with the order of development of the testator's intention in point of time;[7] but only where the clause which is sustained is not inconsistent with the intention of the testator as expressed or clearly implied in the general tenor of the will.[8] In connection with the interpretation both of statutes and of wills, the principle contained in this maxim must be considered along with the other principle involved in the maxim *Generalia specialibus non derogant.*[9]

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[1] Bell, Com. ii. 144; *Marshall* v. *Callander and Trossachs Hydropathic Co.*, 1895, 22 R. 954; 23 R. (H.L.) 55.

[2] P. 300, *ante*; and Maclaren, Court of Session Practice, p. 802.

[3] *Donald* v. *Nicol*, 1866, 5 M. 146.

[4] *Massey* v. *Smith*, 1785, Mor. 8377.

[5] P. 302, *ante.*

[6] Maxwell, Interpretation of Statutes, 7th ed., 136, 147.

[7] M'Laren on Wills, i. 338.

[8] *Ibid.*

[9] *Morall* v. *Sutton*, 1845, 14 L.J. (Ch.) 267, per Coleridge J. at p. 272. See para. 1263, *supra.*

SECTION 76.—PRIOR TEMPORE POTIOR JURE.

1284. "The earlier in date is preferable in right." Among competing titles that which has been earliest made complete is preferred to those completed later in date. In applying this maxim, the date which rules is that of the completion of the legal solemnities constituting the title. Thus heritable titles rank according to the dates on which they have been entered in the public registers, registration being now essential to the completion of the title; whereas, in early times, the title was completed by the actual giving of sasine, and in those days the date of sasine ruled. Competing assignations of personal rights rank according to the dates of their respective completion by intimation. Arrestments rank by the dates of the respective decrees of furthcoming. The rule suffers wide exception under 1661, c. 62, by which all effectual apprisings and adjudications within year and day of the first completed diligence are to be ranked *pari passu* with the latter. Arrestments and poindings within sixty days of bankruptcy are also ranked *pari passu*,[1] and indeed the principal object of the bankruptcy laws is to override the common-law rule of ranking laid down under the maxim here treated of. It is to be noted that the landlord's hypothec is excepted from the provisions of s. 10 of the 1913 Act.[2]

SECTION 77.—QUI FACIT PER ALIUM FACIT PER SE.

1285. "He who does a thing through another is held to have done it himself." On this principle a master is civilly responsible for the acts of his servant done in the ordinary course of the duties entrusted to him. There are two classes of exception to this vicarious responsibility. (1) A master is not liable for an injury done by his servant to a fellow servant in the same employment,[3] of whatever grade the servant may be.[4] That is a risk which the servant is understood to have taken in his contract of service.[5] (2) One who employs an independent contractor to do work which if properly executed involves no risk to others is not liable for injuries done to third persons from the negligent execution of the work.[6] See NEGLIGENCE; REPARATION. This maxim also applies to a limited extent in cases of crime. If a master orders his servant to do what is obviously a criminal act, *e.g.* to steal, both will be liable as being act and part in the crime. But if the act be not obviously criminal, the doer of it, if he had no guilty knowledge, is not guilty of a crime, but the person for whom he acted is guilty and must bear the consequences. Thus where a servant on his master's instructions utters a bill which the master knows but the servant does not know to be forged, the master alone is criminally responsible.

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[1] Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), s. 10.

[2] *Ibid.*, s. 115.

[3] *Bartonshill Coal Co.* v. *Reid*, 1858, 3 Macq, 266.

[4] *Duthie* v. *Caledonian Rly. Co.*, 1898, 25 R. 934; *Johnson* v. *Lindsay & Co.*, [1891] A.C. 371.

[5] *Hutchinson* v. *York, Newcastle and Berwick Rly. Co.*, 1850, 5 Ex. 343, at p. 352; *Howells* v. *Landore Steel Co.*, 1874, L.R. 10 Q.B. 64, at p. 65.

[6] *Stephen* v. *Thurso Police Commrs.*, 1876, 3 R. 535, at p. 540; *Taylor* v. *Greenhalgh*, 1878, L.R. 9 Q.B. 487.

SECTION 78.—QUI JURE SUO UTITUR NEMINEM LÆDIT.

1286. "He who uses his own rights does wrong to no one." The exercise of one's right to do a thing which one is fully entitled to do, although it may result in loss to another, is not a legal wrong, provided it be not done for the mere purpose of injuring one's neighbour.[1] See ÆMULATIO VICINI.[2] Thus a proprietor may be entitled to build up to the edge of his land, although the result be to destroy his neighbour's lights.[3] For the enjoyment of property, many operations require to be carried out which necessarily affect neighbouring proprietors. If these operations are carried out in the usual way there is no liability upon the doer, although the result may be to hurt a neighbour.[4]

SECTION 79.—QUOD FIERI DEBET INFECTUM VALET.

1287. "What ought to be done avails though not done." This maxim applies not to things which ought to be done for a person's own behoof, but to those which ought to be done for behoof of others. In the former case one must suffer the penalty of one's own neglect. In the latter category there are acts, failure to perform which does not deprive the other of the advantage which would have resulted if the thing had been done.[5] The principle has frequently been applied where trustees have omitted or failed to carry out the imperative directions of a testator.[6] "The rule in all such cases is that what ought to have been done shall be taken as done, and a rule so powerful it is as to alter the very nature of things: to make money land, and, on the contrary, to turn land into money." [7]

SECTION 80.—QUOD NULLIUS EST FIT OCCUPANTIS: QUOD NULLIUS EST FIT DOMINI REGIS.

1288. "That which has no owner belongs to him who takes it." In the Roman law the maxim applied both to property which had never been appropriated and to that which had ceased to belong to anyone. In Scotland the acquisition of property by occupancy applies only to the former class. Thus wild animals, birds, and fish belong to the captor, and the same is true of the finder of shells, pearls, pebbles or precious stones on the seashore. In the case of the second class—property lost, forgotten, or abandoned—Scots law applied the maxim, *Quod nullius est fit domini regis*, and the right goes to the Crown, and is generally given as a donation to the finder. "The principle on which this rests is public expediency, to avoid fraud, contests, and litigation, together with some slight purpose of adding to the public reserve." The rule operates only when the article lost can be held as abandoned by the owner. Till then, subject to police regulations under certain Acts of Parliament, the finder is entitled to possession against all but the true owners.[1]

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[1] Bell's Prin., s. 965; Ersk. ii. 1, 2; *Linwood* v. *Hathom*, 14th May 1817, F.C.; 1821, 1 Sh. App. 20; *Gibson* v. *Stewart*, 1894, 21 R. 437.

[2] See para. 1214, *supra*.

[3] *Glassford* v. *Astley*, 1808, Hume 516; *Arnistead* v. *Bowerman*, 1888, 15 R. 814.

[4] *Dunlop* v. *Robertson*, 1803, Hume 515.

[5] See *M'Kellar* v. *Livingston & Co.*, 1861, 23 D. 1269, at p. 1273.

[6] *Earl of Stair* v. *Stair's Trs.*, 1826, 2 W. & S. 414; *Dickson's Tutors* v. *Scott*, 1853, 16 D. 1; *Forsyth* v. *Kilgour*, 1854, 17 D. 207, at p. 214; *Love's Trs.* v. *Love*, 1879, 7 R. 410; *Hunter* v. *Dowling*, [1893] 3 Ch. 212, at p. 215.

[7] *Lechmere* v. *Carlisle*, 1733, 3 P. Wms. 211, per Jekyll M.R. at p. 215.

SECTION 81.—RES GESTÆ.

1289. The whole circumstances connected with an occurrence or transaction—"The whole thing that happened." Statements otherwise inadmissible as hearsay, may be proved when they form part of the *res gestæ.* The ground of admission of such evidence is that "words which accompany acts, or which are so connected with them as to arise from co-existing motives, form part of the conduct of the individual, which cannot be rightly understood unless his words as well as his acts are proved."[2] See EVIDENCE.[3]

SECTION 82.—RES INTER ALIOS ACTA, ALIIS NEQUE NOCET, NEQUE PRODEST.

1290. A thing done, or a transaction entered into, between certain parties cannot advantage or injure those who are not parties to the act or the transaction. A co-debtor thus cannot be affected by the admissions or pleas of his co-debtor in an action founded on their joint obligation, but to which he has not been called as a party; nor does the decision in that action render the question as between him and the creditor *res judicata.* On the other hand, while he cannot be injured by that decision, neither can he be advantaged by it.[4] This rule, however, is not without exceptions. Questions may arise between parties having identical interests, *e.g.* classes of beneficiaries in which a decision is pronounced to which all members of the class interested were not parties, and yet the decision will be *res judicata* upon all members of the classes whose interests are the matter of that decision.[5]

SECTION 83.—RES IPSA LOQUITUR.

1291. "The thing itself speaks: the thing done speaks for itself." This phrase is frequently used in regard to claims for damages for injury through negligence, importing that no proof is required beyond the fact of the accident itself to place the burden upon the defender of explaining the accident. The maxim is one which only applies to a limited class of cases—and in these cases the effect of it is to raise a presumption of negligence which the defender has to rebut.[1] Examples of the class of cases to which the maxim applies are found in accidents causing injury to a servant through defective plant which he was obliged to use and it was the duty of the employer to supply,[2] and in accidents caused by the fall of an article which should be secure—*e.g.* upon the head of a visitor to a warehouse.[3] The maxim has no application to such cases as collision between vehicles in the street in which the duties of the drivers are equal not to collide with others, and accordingly the mere fact of collision is not relevant to infer fault against one driver or the other. Its effect has been thus stated: "(1) It is the expression in the form of a maxim of what in the affairs of life frequently strikes the mind, *i.e.* that a thing tells its own story—not always, but sometimes. (2) But although a thing tells its own story, that is not necessarily the whole story. Accordingly, (3) when the story would seem relevant to infer liability for some occurrence out of the usual, the remainder of the story may displace that inference. But (4) if the remainder of the story does not do so, then the inference remains—*res ipsa loquitur.*" [4]

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[1] Bell's Prin., ss. 1287, 1288, 1291.

[2] Dickson on Evidence, s. 254; see Hume, ii. 406; Alison, ii. 517.

[3] Vol. VI. p. 400, *ante.*

[4] *Jenkins* v. *Robertson*, 1867, 5 M. (H.L.) 27.

[5] See per Lord Pres. Dunedin in *Baillie's Trs.* v. *Whiting*, 1910 S.C. 887, at p. 889.

SECTION 84.—SIC UTERE TUO UT ALIENUM NON LÆDAS.

1292. "So use your property as not to injure the rights of others." This maxim does not restrict an owner in the lawful use of his property, or imply that he is to give up any of his legal rights for the sake of his neighbour.[5] But if there are various ways of conducting an operation a proprietor is not entitled to select a method which is injurious to his neighbour instead of one which would be harmless.[6] He must have a reasonable regard to the interest of his neighbours and abstain from causing him unnecessary harm. This maxim has its chief illustration in the limitations on use of land involved in the law as to support of a neighbour's lands. See SUPPORT.

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[1] *Ballard* v. *North British Rly. Co.*, 1923 S.C. (H.L.) 43, per Lord Dunedin at p. 53.

[2] E.g. *Macaulay* v. *Buist & Co.*, 1846, 9 D. 245; *Fraser* v. *Fraser*, 1882, 9 R. 896; *Walker* v. *Olsen*, 1882, 9 R. 946; *Macfarlane* v. *Thomson*, 1884, 12 R. 232.

[3] *Briggs* v. *Oliver*, 1866, 4 H. & C. 403, at p. 407.

[4] *Ballard* v. *North British Rly. Co.*, *supra*, per Lord Shaw at p. 56.

[5] *Gibson* v. *Stewart*, 1894, 21 R. 437, and see paras. 1214 and 1286, *supra*.

[6] *Arnistead* v. *Bowerman*, 1888, 15 R. 814, at p. 822.

MEASURES.

See WEIGHTS AND MEASURES.

MECHANICAL LIGHTERS.

See EXCISE.

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See NATIONAL HEALTH INSURANCE.

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PART I.—MEDICINE.

SECTION 1.—INTRODUCTION.

1293. The practice of medicine and surgery, like that of other crafts, was for long regulated by local guilds, and the two crafts were separate. In Edinburgh, for example, the surgeons and barbers were incorporated by seal of cause in 1505, and obtained the privilege of restricting the practice of their arts in the Lothians, Fife, Peebles, Roxburgh, Selkirk, and Berwick to their own members, or at least to those who had been examined and approved by them. The physicians obtained a royal charter in 1681, and by it power to regulate practice within the burgh. In Glasgow a royal charter was granted in 1599 to certain individuals, which was held to erect them into a corporation with power to prohibit the practice of surgery, though not of medicine, by any person, even a graduate of a university, within Glasgow and the neighbouring counties.[1] Apart from the local restrictions imposed by such bodies there was no limitation on the right to practise medicine and surgery. These safeguards were apparently removed by the Burgh Trading Act, 1846,[2] and nothing took their place till the passing of the Medical Act, 1858.[3]

SECTION 2.—REGISTRATION OF MEDICAL PRACTITIONERS.

SUBSECTION (1).—*Introductory.*

1294. A general regulation of the practice of medicine and surgery was first introduced into Scotland by the Medical Act, 1858,[3] which applied to the whole United Kingdom. The purpose of the Act, as set out in the preamble, was to enable persons requiring medical aid "to distinguish qualified from unqualified practitioners." To achieve this purpose the Act provided for the registration of all qualified practitioners, set up a body called the General Council of Medical Education and Registration of the United Kingdom (thereinafter referred to as the general council) to supervise the registrar and to scrutinise the qualifications recognised as conferring a right to registration, granted certain privileges to registered practitioners, and imposed penalties upon those who falsely held themselves out to be registered. Several amending Acts have been passed, of which much the most important is the Medical Act, 1886.[4]

SUBSECTION (2).—*The General Council.*

1295. The general council, which is a body corporate,[5] consists of thirty-eight members.[6] Of these, five are nominated by His Majesty—three for England and one for Scotland, with the advice of the Privy Council, and one for Ireland on the recommendation of the Governor of Northern Ireland.[7] Twenty-seven members are chosen by various bodies, mainly universities and colleges, and six persons, "direct representatives," are elected by the registered medical practitioners—four from England,[8] one from Scotland, and one from Ireland.[7] Regulations are laid down for the conduct of the election of the direct representatives.[9] For each country there is a branch council.[10] It consists of the members of the council chosen by the medical corporations and the universities of that country, together with the member or members nominated by His Majesty and the direct representatives for that country.[11]

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[1] *University of Glasgow* v. *Faculty of Physicians and Surgeons of Glasgow*, 1834, 13 S. 9 ; 1835, 2 Sh. & M'L. 275 ; 1837, 15 S. 736 ; 1840, 1 Rob. App. 397.

[2] 9 & 10 Vict. c 17.

[3] 21 & 22 Vict. c. 90.

[4] 49 & 50 Vict. c. 48.

[5] The Medical Act, 1862 (25 & 26 Vict. c. 91), s. 1.

[6] The Medical Act, 1886, s. 7 ; S.R. & O. 1909 (No. 916), p. 578, and Acts applicable to the newer English Universities (Index to Statutes in force to 1927, p. 1070, note (*a*)).

[7] Medical and Dentists Acts Amendment Act, 1927 (17 & 18 Geo. V. c. 39), Schedule, Part I. para. 2.

[8] S.R. & O. 1909 (No. 916), p. 578.

[9] 1886 Act, s. 8 (4) ; S.R. & O. 1906 (No. 809), p. 390.

[10] 1858 Act, s. 6.

[11] 1886 Act, s. 8 (2).

SUBSECTION (3).—*The Register.*

1296. The general council must appoint a registrar, who acts at the same time as branch registrar for England under the English branch council.[1] The branch councils for Scotland and Ireland must appoint branch registrars.[2] It is the duty of the registrars to keep their registers correct in accordance with the provisions of the Act and the orders and regulations of the general council, to erase the names of all persons who have died, of which the registrar of deaths must inform them,[3] and to make the necessary alterations in the addresses or qualifications of the persons registered.[4]

1297. Every person possessing one or more of the requisite qualifications [5] is entitled to be registered on producing to the registrar of one of the branch councils evidence of his qualifications and making payment of the prescribed fee of five pounds.[6] The branch registrar must thereupon forward the entry for insertion in the general register.[7] The registrar must be satisfied that a person claiming registration is entitled to it. An appeal lies against his decision to the general council or the branch council, as the case may be.[8] The councils may direct the erasure of an entry fraudulently obtained or incorrectly made.[8] Any person who wilfully obtains or attempts to obtain registration by false representations is liable to a fine or imprisonment.[9]

1298. The general council has, as enjoined by the Act,[10] made orders regulating the keeping of the register. The register consists of three lists containing respectively the names of registered practitioners of the United Kingdom, colonial practitioners, and foreign practitioners registered under the 1886 Act.[11] It must be published every year. A copy is evidence that the persons therein specified are registered in accordance with the Act ; the absence of the name of any person is *prima facie* evidence that such person is not registered.[12]

SUBSECTION (4).—*Qualifications for Admission to Register.*

(i) *United Kingdom Practitioners.*

1299. The qualifications in respect of which registration may be obtained as a registered practitioner of the United Kingdom are, broadly speaking, the degrees in medicine and surgery of the British universities and the like diplomas of the colleges and other medical corporations.[13] The general council is entitled to be furnished with information regarding the courses of study and examinations required for obtaining the qualifications granted by these bodies,[14] and, if these are not such as to secure the requisite knowledge and skill for the efficient practice of the profession, the general council may represent the same to the Privy Council.[1] Upon such representation the Privy Council may, if it see fit, order that any qualification granted by such body after a specified date shall not confer any right to be registered under the Act.[2] Such order may be revoked,[2] but no person may be registered in respect of a qualification granted while it was in force.[3]

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[1] 1858 Act, s. 10.
[2] *Ibid.*, s. 11.
[3] *Ibid.*, s. 45.
[4] *Ibid.*, s. 14.
[5] See para. 1299 *et seq.*
[6] 1858 Act, s. 15.
[7] *Ibid.*, s. 25.
[8] *Ibid.*, s. 26.
[9] *Ibid.*, s. 39 ; though repealed as regards England by the Perjury Act, 1911, this section is still operative for Scotland.
[10] *Ibid.*, s. 16.
[11] *Ibid.*, s. 27 and Schedule D ; 1886 Act, s. 14.
[12] 1858 Act, s. 27.
[13] *Ibid.*, s. 15 and Schedule A, as amended by the Medical Act, 1859 (22 Vict. c. 21), ss. 4 and 5.
[14] *Ibid.*, s. 18.

1300. The 1886 Act set up an additional safeguard for the maintenance of the standard of education. No person may be registered who has not passed a qualifying examination in medicine, surgery, and midwifery.[4] It is the duty of the general council to secure such a standard of proficiency as to guarantee the possession of the knowledge and skill requisite for the efficient practice of medicine, surgery, and midwifery. For that purpose it must appoint inspectors to attend all or some of the qualifying examinations and report as to their sufficiency.[5] If the general council represents to the Privy Council that the standard required by any examining body is insufficient, the Privy Council may declare that the examinations of such body shall not be deemed to be qualifying examinations for the purpose of registration. Such order may be revoked.[6] If the general council fails to perform these duties, the Privy Council is entitled to act directly.[7]

(ii) *Colonial and Foreign Practitioners.*

1301. The 1886 Act introduced a system under which colonial and foreign practitioners might obtain registration in the British register, with its attendant advantages. Sec. 17 empowers His Majesty by Order to declare that Part II. of the Act shall be deemed to apply to any British possession or foreign country which in the opinion of His Majesty affords to the registered medical practitioners of the United Kingdom such privileges of practising in that British possession or foreign country as seem just. This power has been exercised, *e.g.* in regard to Italy,[8] Japan,[9] and Belgium.[10] His Majesty has also power to declare a part of a British possession to be a separate possession for the purposes of this Part of the Act.[11] This power has been freely exercised.[12] Such Orders may be,[13] and have frequently been, revoked.[14] A person who holds a recognised medical diploma granted him in a British possession or foreign country to which Part II. of the Act applies, and who is entitled by law to practise medicine, surgery, and midwifery in such possession or country, and who fulfils certain other conditions, is entitled to be registered in the British register as a colonial or a foreign practitioner, as the case may be.[1] The diplomas which entitle such a person to registration are those recognised for the time being by the general council as furnishing a sufficient guarantee of the possession of the requisite knowledge and skill for the efficient practice of medicine, surgery, and midwifery.[2] A person who is refused registration under this Part of the Act has a right of appeal to the Privy Council.[3]

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[1] 1858 Act, s. 20.
[2] *Ibid.*, s. 21.
[3] *Ibid.*, s. 22.
[4] 1886 Act, s. 2.
[5] *Ibid.*, s. 3.
[6] *Ibid.*, s. 4.
[7] *Ibid.*, s. 19.
[8] S.R. & O. revised to 1903, vol. viii. Medical Profession, 1.
[9] S.R. & O. 1905 (No. 1295), p. 206.
[10] S.R. & O. 1915 (No. 8), i. 394; 1920 (No. 2449), i. 1143.
[11] Medical Act (1886) Amendment Act, 1905 (5 Edw. VII. c. 14), s. 1.
[12] See Index to S.R. & O. to 1924, p. 469.
[13] 1886 Act, s. 17 (2).
[14] *E.g.* Ontario, S.R. & O. 1927 (No. 1246), p. 773.

SUBSECTION (5).—*Privileges of Registered Practitioners.*

1302. Only a registered medical practitioner, *i.e.* a person for the time being registered under the Medical Acts,[4] may recover at law fees for medical and surgical attendance.[5] Sec. 32 does not prevent an unregistered assistant from suing his employer for salary,[6] or an osteopath from suing his patients for fees charged for treatment as distinct from diagnosis or advice.[7] A registered medical practitioner is exempt from service on juries,[8] and is alone eligible for certain public appointments.[9] No certificate which requires to be signed by a medical practitioner is valid unless signed by a registered medical practitioner.[10] He has also certain duties and privileges with regard to poisons and dangerous drugs.[11]

SUBSECTION (6).—*Removal from the Register.*

1303. If the body which granted the qualification in respect of which a practitioner is registered withdraws that qualification, his name may be removed from the register.[12] If, however, he has other qualifications registered, his name cannot be removed so long as he retains them. A practitioner's name may be removed at his own request.[13]

1304. If a registered medical practitioner is convicted in England or Ireland of any felony or misdemeanour, or in Scotland of any crime or offence, or is, after due inquiry,[14] judged by the general council to have been guilty of infamous conduct in any professional respect, the council may, if they see fit, direct the erasure of his name from the register.[15] If the proceedings are based upon a conviction, all that is necessary is to prove the conviction;[16] if they are based upon the conduct of the practitioner, the question arises, What constitutes "infamous conduct in a professional respect"? In the earlier cases,[17] where the decisions of the council were brought before the Court for review, the Court held that the general council were the sole judges of whether or not a practitioner had been guilty of infamous conduct in a professional respect, and that, whether the evidence submitted to the council would support the finding or not, the Court would not interfere; it was sufficient if the statement of the complaint shewed that the council had jurisdiction to enter upon the inquiry.[1] But in a case [2] decided a few months later than *Allbutt,* while the same view was taken as to jurisdiction, a new feature appeared in the judgments. The Court considered the question whether there was sufficient evidence to support the decision of the council, because, if there was not, that would be *prima facie* evidence that the council had not acted honestly, but with an indirect motive.[3] In the latest case [4] the Court really treated the decision of the council like the verdict of a jury, and considered whether there was evidence to support the decision.[5]

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[1] 1886 Act, ss. 11 and 12.

[2] *Ibid.*, s. 13 (1).

[3] *Ibid.*, s. 13 (3).

[4] *Ibid.*, s. 27.

[5] 1858 Act, s. 32; 1886 Act, s. 6; see para. 1313, *infra.*

[6] *De la Rosa* v. *Prieto*, 1864, 16 C.B. (N.S.), 578.

[7] *Hall* v. *Trotter*, 1921, 38 T.L.R. 30; *Macnaghten* v. *Douglas*, [1927] 2 K.B. 292.

[8] 1858 Act, s. 35.

[9] *Ibid.*, s. 36.

[10] *Ibid.*, s. 37.

[11] See paras. 1334, 1337, 1342, 1350, and 1352, *infra.*

[12] *Ibid.*, s. 28.

[13] *R.* v. *General Medical Council*, 1929, 45 T.L.R. 631.

[14] *Leeson* v. *General Council of Medical Education and Registration*, 1889, 43 Ch.D. 366, per Bowen L.J. at p. 383.

[15] 1858 Act, s. 29.

[16] *Ex parte* C.A.B., 1900, Harper's Legal Decisions upon the Medical and Dentists Acts, p. 188.

[17] *Ex parte La Merte*, 1863, 4 B. & S. 582; *Allbutt* v. *General Council of Medical Education and Registration*, 1889, 23 Q.B.D. 400.

1305. Accordingly, the question of what constitutes infamous conduct in a professional respect is a legal question. In the first place, the conduct must be infamous *in a professional respect.*[6] No doubt if a doctor commits adultery, that is infamous conduct, but it is only infamous in a professional respect if it followed or was contemporaneous with professional relations, so that there is an inference that the doctor has abused his professional position.[7] Secondly, the conduct must be such that it would be reasonably regarded as disgraceful or dishonourable by the practitioner's professional brethren of good repute and competency.[8] The following are illustrations of conduct which probably fall within the definition: Defaming fellow practitioners, so as to induce patients to leave them and go to the practitioner making the defamatory statements; [8] covering, *i.e.* enabling an unqualified person to practise as if qualified; [9] the publication of a book detrimental to public morals; [10] signing an untrue certificate or report; a contravention of the Dangerous Drugs Acts; [11] consultation with unqualified or unregistered persons; advertising; and canvassing.[12]

1306. The council in the exercise of these functions are a *quasi*-judicial body, and the members must bear such a relation to the matter that they cannot reasonably be suspected of bias.[13]

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[1] *Allbutt* v. *General Council of Medical Education and Registration,* 1889, 23 Q.B.D. 400, per Lopes L.J. at p. 408.

[2] *Leeson* v. *General Council of Medical Education and Registration,* 1889, 43 Ch.D. 366.

[3] *Ibid.,* per Cotton L.J. at p. 377; Bowen L.J. at p. 384.

[4] *Allinson* v. *General Council of Medical Education and Registration,* [1894] 1 Q.B. 750.

[5] *Ibid.,* per Esher M.R. at p. 760; Lopes L.J. at p. 763.

[6] *Allinson, supra,* per Esher M.R. at p. 761.

[7] Bullock, Law relating to Medical, Dental, and Veterinary Practice, p. 175.

[8] *Allinson, supra,* per Esher M.R. at p. 760.

[9] As in *Leeson, supra.* [10] As in *Allbutt, supra.* [11] See paras. 1349 *et seq., infra.*

[12] Bullock, Law relating to Medical, Dental, and Veterinary Practice, pp. 172–174.

[13] *Allinson, supra,* per Esher M.R. at p. 758; Lopes L.J. at p. 762; Davey L.J. at p. 764; *Leeson, supra,* per Cotton L.J. at p. 379; Bowen L.J. at p. 384; Fry L.J. at p. 386.

SUBSECTION (7).—*Unregistered Practitioners.*

1307. There is no such restriction in Great Britain on the right to practise medicine and surgery as exists in most other civilised countries, and as does in this country in the case of dentistry.[1] Anyone may practise, and people are quite at liberty to consult unregistered persons. The purpose of the Acts is to ensure that they know that they are doing so. Accordingly, it is provided that any person who shall wilfully and falsely pretend to be, or take or use the name or title of, a physician, doctor of medicine, etc., or any name, title, addition, or description implying that he is registered under the Act, or that he is recognised by law as a physician or surgeon, etc.,[1] is guilty of an offence and liable to a penalty not exceeding twenty pounds.[2] If a person takes a title to which he has no right but under the belief that he has such a right, he does not take it wilfully and falsely.[3] The other reported cases [4] on the section throw little light on its meaning.

SECTION 3.—PRACTICE.

SUBSECTION (1).—*Care and Skill required.*

(i) *Civil Responsibility.*

1308. "If a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill, and caution in administering the treatment. . . . The law requires a fair and reasonable standard of care and competence. . . . If the patient's death has been caused by the defendant's indolence or carelessness, it will not avail to shew that he had sufficient knowledge; nor will it avail to prove that he was diligent in attendance if the patient has been killed by his gross ignorance and unskilfulness." [5] These observations were made in a criminal appeal, but were specifically stated to deal with civil liability. Further, they apply *mutatis mutandis* where the patient has been injured but has not died.

1309. A practitioner is not bound to undertake any case, and his responsibilities only begin when he has undertaken it. With regard to carelessness, it is a question of circumstances in each case whether the diligence shewn was reasonable. If a doctor prescribes a course of treatment and tells the patient to go on with it till ordered to stop and forgets to stop it at the proper time, that is negligence.[1] Using dirty instruments at an operation would be negligence, and so would it be to sew up a sponge or an instrument in the patient after an operation,[2] or to order the use of a dangerous drug without knowledge of its qualities,[3] or, with knowledge of its qualities, to give it to a patient to use without proper instructions.[4] A practitioner is not responsible for the correctness of an opinion given honestly and without negligence.[5] It should be added that reasonable skill and knowledge must be shewn.[6] He is responsible for the negligent carrying out of treatment ordered by him if he actually supervises it, but not if it is such treatment as he is entitled to leave, and does leave, to another to carry out. So he is not responsible if he orders a hot bath and the nurse scalds the patient,[7] or if after an operation the nurse puts too hot a bottle in the patient's bed and burns him.

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[1] See as to Midwifery, MIDWIVES, p. 628, *infra*.

[2] 1858 Act, s. 40.

[3] *Hunter* v. *Clare*, [1899] 1 Q.B. 635.

[4] *Steel* v. *Ormsby*, 1894, 10 T.L.R. 483; *R.* v. *Lewis and Frickhart*, 1896, 60 J.P. 392; *R.* v. *Baker*, 1891, 8 T.L.R. 123; *Carpenter* v. *Hamilton*, 1877, 37 L.T. 157; *Andrews* v. *Styrap*, 1872, 26 L.T. 704; *Eastburn* v. *Robertson*, 1898, 1 F. (J.) 14; *De Banzie* v. *Peebles*, 1875, 2 R. (J.) 22.

[5] *R.* v. *Bateman*, 1925, 41 T.L.R. 557, per Lord Hewart C.J. at p. 559.

1310. The standard of skill required of a general practitioner is that of the ordinary general practitioner.[8] A specialist is bound to shew the higher skill which he professes.[9] If an unregistered practitioner renders medical assistance, he must, if not known to the patient to be unregistered, attain the standard of skill of the registered practitioner at the place and in the circumstances where the services are rendered; if known to be unregistered, such skill as he professes.[8] If the master of a trawler in case of necessity sets the broken leg of one of the crew, he is not bound to shew the skill of a registered practitioner.

1311. Failure either in diligence or in skill may have two effects. First, if the patient is thereby injured he is entitled to damages *ex delicto*, although the practitioner may actually have been engaged to attend him by another person.[10] Secondly, it may afford a defence to an action for fees for professional attendance [11] entitling the person who engaged the practitioner to refuse implement of his part of the contract—the payment of the fees. The mere fact that the treatment is unsuccessful is no defence unless it was plainly useless.[12]

(ii) *Criminal Liability.*

1312. To support a charge of culpable homicide facts necessary to establish civil liability (except pecuniary loss) must be proved, and, in addition, the negligence of the accused must shew such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.[1] Such conduct, though not actually causing death, might be punished as neglect of duty.[2] Careless dispensing resulting in death or injury may found a charge of culpable homicide or neglect of duty.[3]

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[1] *Farquhar* v. *Murray*, 1901, 3 F. 859.

[2] Beven on Negligence, 4th ed., p. 1359.

[3] *R.* v. *Macleod*, 1874, 12 Cox C.C. 534.

[4] *R.* v. *Chamberlain*, 1867, 10 Cox C.C. 486.

[5] *Urquhart* v. *Grigor*, 1864, 3 M. 283, per Lord Justice-Clerk Inglis at p. 287.

[6] *Ibid.*, per Lord Deas at p. 288.

[7] *Perionowsky* v. *Freeman*, 1866, 4 F. & F. 977.

[8] *Dickson* v. *Hygienic Institute*, 1910 S.C. 352, per Lord Dundas at p. 356.

[9] Beven on Negligence, 4th ed., 1353.

[10] *Edgar* v. *Lamont*, 1914 S.C. 277.

[11] Beven on Negligence, 4th ed., p. 1360; but see *Meyrick* v. *Dyson*, 1925, 41 T.L.R. 368.

[12] *Hill* v. *Featherstonhaugh*, 1831, 7 Bing. 569, per Tindal C.J. at p. 572.

Subsection (2).—*Remuneration.*

1313. Unless he can prove a special contract or custom, a physician has at common law no right to sue for his fees. Fees incurred for the death-bed sickness form an exception to this rule; [4] they are a privileged debt and one of the first charges on the estate.[5] There is no such restriction on surgeons. By s. 6 of the Medical Act, 1886 (which replaces s. 31 of the 1858 Act), a registered medical practitioner is entitled to recover fees unless he is a Fellow of a college of physicians, the fellows of which are prohibited by by-law from recovering their fees at law. A registered practitioner may recover fees for the attendances of an unqualified assistant if he supervised the services.[6] By s. 32 of the 1858 Act no person is entitled to recover fees unless he proves upon the trial that he is registered. Whether in view of the words of the section "prove upon the trial" it is necessary, in order to make a case relevant, to aver that the pursuer is registered has not been considered. The amount of the fees due depends on circumstances, and, if a dispute arose, evidence of the fees usual in such a case would be necessary. As is pointed out above,[7] the right to recover fees may be barred by improper treatment.

Subsection (3).—*Partnerships, Assistants, Locum-tenens, Sale of Practice.*

1314. Medical partnerships, like others, are regulated by the Partnership Act, 1890 [8] (see Partnership). The contract between a practitioner and his assistant is normally one of service, not for services, because the assistant is subject to the practitioner's directions in treatment,[9] and therefore their relations are governed by the law of master and servant.[10]

1315. One term which frequently appears both in partnership agreements and in contracts with assistants calls for special notice. It is usual to stipulate that, on the termination of the contract, one partner or the assistant, as the case may be, shall not commence independent practice within a certain distance of the place where the practice is presently being carried on. Such an agreement is *prima facie* illegal, being in restraint of trade, but it will be sustained if restricted in time and area so as to afford only a reasonable protection to the person for whose benefit it is inserted.[1] Probably the extension of the area of practices due to the use of motor cars will lead the Court rather to apply the general principle afresh to each case than to follow an earlier case when the restriction in the contract is similar. See RESTRAINT OF TRADE.

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[1] *R.* v. *Bateman*, 1925, 41 T.L.R. 557.

[2] Macdonald's Criminal Law, 4th ed., pp. 208, 209.

[3] See para. 1358, *infra*.

[4] Bell's Prin., s. 568, and cases there cited.

[5] *Ibid.*, s. 1403.

[6] *Howarth* v. *Brearley*, 1887, 19 Q.B.D. 303.

[7] See para. 1311, *supra*.

[8] 53 & 54 Vict. c. 39.

[9] *Scottish Insurance Commrs.* v. *Edinburgh Royal Infirmary*, 1913 S.C. 751; *Dow* v. *M'Neill*, 1925 S.C. 50.

[10] See Master and Servant, p. 492, *ante*.

1316. The position of a locum-tenens does not appear ever to have been considered by a Court. Towards the practitioner whose practice he is carrying on he probably owes the duty of doing nothing to injure the practice. Towards the patients whom he attends he owes the ordinary duties of a practitioner, and his failure in any of these duties will not involve the regular doctor in any liability, since their relation is not that of master and servant.[2] Whether, in a question with the patient, the locum-tenens is bound to attend any particular patient must depend on circumstances. If the patient were actually under treatment when he assumed duty and he were told of the necessity to visit, the regular doctor might be regarded as the agent of the patient to instruct attendance, and the instruction would be presumed to be accepted unless expressly refused. If a new case occurs after the locum-tenens assumes duty, he is probably not legally bound to attend.

1317. The legal position of what is called the sale of a practice has been considered in two cases.[3] The effect of the contract is that the seller undertakes to introduce the buyer to the patients. If the seller is the practitioner who has actually been carrying on the practice, he undertakes not to practise in competition, this agreement being subject to the rule that the restriction must only be enough to protect the buyer.[4]

SECTION 4.—STATUTORY DUTIES.

SUBSECTION (1).—*Notification of Births.*

1318. It is the duty of any person in attendance upon the mother at the time of, or within six hours after, a birth to give notice in writing of the birth to the medical officer of health of the district in which the child is born.[5] The penalty for failure to give notice is a fine not exceeding twenty shillings, provided that a person is not liable to a penalty if he satisfies the Court that he had reasonable grounds for believing that the notice had been duly given by some other person.[6] Accordingly, while the duty of notification does rest upon the medical practitioner in attendance as well as upon the father and the midwife, he would in most cases have a good defence by shewing that the duty was usually performed by the midwife or that he had warned the father of his duty.

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[1] *Ballachulish Slate Quarries Co.* v. *Grant*, 1903, 5 F. 1105; *Stewart* v. *Stewart*, 1899, 1 F. 1158; *Fitch* v. *Dewes*, [1921] 2 A.C. 158.

[2] *Foote* v. *Directors of Greenock Hospital*, 1912 S.C. 69.

[3] *Bain* v. *Munro*, 1878, 5 R. 416; *Rodger* v. *Herbertson*, 1909 S.C. 256.

[4] See para. 1315, *supra*.

[5] Notification of Births Act, 1907 (7 Edw. VII. c. 40), s. 1 (1), as amended by the Notification of Births (Extension) Act, 1915 (5 & 6 Geo. V. c. 64), s. 1 (1).

[6] *Ibid.*, s. 1 (3).

SUBSECTION (2).—*Death Certificates.*

1319. In case of the death of any person who has been attended during his last illness by a medical practitioner, the practitioner must sign and hand to the registrar within seven days of the death a certificate stating the cause of death.[1]

SUBSECTION (3).—*Notification of Disease.*

(i) *Infectious Diseases (Notification) Act,* 1889.[2]

1320. Where an inmate of any building used for human habitation in a district to which the Act applies [3] is suffering from an infectious disease, then, unless the building is a hospital for infectious diseases, a duty of giving notification rests upon every medical practitioner attending on or called in to visit the patient. He must send to the medical officer of health for the district a certificate stating the name of the patient, the situation of the building, and the infectious disease from which, in his opinion, the patient is suffering.[4] The practitioners upon whom this duty is imposed are not described in the section as registered medical practitioners or by any of the phrases declared to be equivalent thereto.[5] Accordingly, it would seem to extend to any person who gives professional medical attention. "Infectious disease" is not defined, but s. 6 contains a list of the "infectious diseases to which this Act applies," and a local authority, with the approval of the Department of Health for Scotland,[6] may order the Act to apply in their district to any other infectious disease.[7] The regulations at present in force regarding notification are contained in the Public Health (Notification of Infectious Diseases) Regulations (Scotland), 1919.[8]

(ii) *Public Health (Scotland) Act,* 1897.[9]

1321. The Public Health (Scotland) Act, 1897, gives power to the Local Government Board for Scotland, now the Department of Health for Scotland,[1] to make regulations with a view to the treatment of persons affected with any epidemic, endemic, or infectious disease, and preventing the spread of such diseases.[2] Orders are at present in force in regard to the following diseases: Tuberculosis,[3] ophthalmia neonatorum,[4] infantile paralysis, polio-encephalitis and encephalitis lethargica,[5] malaria, dysentery, acute primary pneumonia and acute influenzal pneumonia,[6] infective jaundice,[7] chicken-pox,[8] puerperal fever, and puerperal pyrexia.[9] Each Order provides that every medical practitioner (defined in each Order to mean registered medical practitioner), as soon as he becomes aware that a person on whom he is in professional attendance is suffering from the disease, must forthwith transmit a notification thereof to the Medical Officer of Health of the district in the form and containing the particulars set forth in the undernoted Order.[10] Similar provisions are made regarding infectious disease carriers.[11]

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[1] Registration of Births, etc. (Scotland) Act, 1854 (17 & 18 Vict. c. 80), s. 41 ; Registration of Births, etc. (Scotland) Act, 1860 (23 & 24 Vict. c. 85), s. 14.

[2] 52 & 53 Vict. c. 72.

[3] Extended to every district in Scotland by the Public Health (Scotland) Act, 1897 (60 & 61 Vict. c. 38), s. 44.

[4] Sec. 3 (1) (*b*).

[5] *E.g.* by the Medical Act, 1858, s. 34, and the Public Health (Scotland) Act, 1897, s. 3.

[6] Local Government (Scotland) Act, 1894 (57 & 58 Vict. c. 58), s. 3 ; Scottish Board of Health Act, 1919 (9 & 10 Geo. V. c. 20), ss. 1 and 4 ; Reorganisation of Offices (Scotland) Act, 1928 (18 & 19 Geo. V. c. 34), s. 1.

[7] 1889 Act, ss. 7 and 17.

[8] S.R. & O. 1919 $\left(\text{No. }\frac{1523}{\text{s. }41}\right)$, ii. p. 371.

[9] 60 & 61 Vict. c. 38.

PART II.—PHARMACY.

SECTION 1.—INTRODUCTORY.

1322. Dealings in drugs were not subjected in Scotland to any restrictions by statute until the middle of the nineteenth century. Legislation now regulates such dealings in two ways. First, it places restrictions upon the right to use the title "chemist" and allows a distinctive designation only to those who may be broadly described as registered chemists. Second, it limits the right to deal in certain drugs and regulates the method of dealing in them. The drugs affected by these limitations and regulations are statutory poisons, dangerous drugs and therapeutic substances, and certain acids. Drugs which do not fall within one or other of these categories may be freely supplied by any person, subject to this, that the formularies of the British Pharmacopœia may have to be observed in dispensing.[1]

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[1] See note 6 to para. 1320.

[2] Sec. 78.

[3] S.R. & O. 1914 $\left(\text{No. }\frac{732}{\text{s. }64}\right)$, iii. p. 219; $\left(\text{No. }\frac{879}{\text{s. }73}\right)$, iii. p. 227.

[4] S.R. & O. 1918 $\left(\text{No. }\frac{856}{\text{s. }29}\right)$, ii. p. 704.

[5] S.R. & O. 1925 $\left(\text{No. }\frac{1244}{\text{s. }82}\right)$, p. 1417.

[6] S.R. & O. 1927 $\left(\text{No. }\frac{1191}{\text{s. }63}\right)$, p. 1011.

[7] S.R. & O. 1927 $\left(\text{No. }\frac{54}{\text{s. }7}\right)$, p. 1008; and $\left(\text{No. }\frac{\text{s. }62}{1190}\right)$, p. 1010.

[8] S.R. & O. 1927 $\left(\text{No. }\frac{270}{\text{s. }15}\right)$, p. 1005; 1928 $\left(\text{No. }\frac{896}{\text{s. }46}\right)$, p. 1062.

[9] S.R. & O. 1929 $\left(\text{No. }\frac{587}{\text{s. }36}\right)$.

[10] S.R. & O. 1919 $\left(\text{No. }\frac{1523}{\text{s. }41}\right)$, p. 371.

[11] S.R. & O. 1925 $\left(\text{No. }\frac{1321}{\text{s. }87}\right)$, p. 1412.

SECTION 2.—REGISTERED CHEMISTS.

SUBSECTION (1).—*General.*

1323. The phrase "registered chemist" does not occur in any Act or regulation, but it is convenient to include the two classes of person who enjoy special privileges in regard to the use of the title of chemist and the right of dealing in certain drugs. These classes are "pharmaceutical chemists" and "chemists and druggists." The titles are conferred and protected by the Pharmacy Acts. The phrase "registered chemist" is used in this article to include "registered pharmaceutical chemists" and "registered chemists and druggists."

SUBSECTION (2).—*Pharmaceutical Chemists.*

1324. The Pharmaceutical Society was incorporated by royal charter in 1843, and the charter was confirmed in 1852.[2] The council of the society must appoint a registrar, who, in addition to his duties with regard to the society and its members,[3] keeps the register of pharmaceutical chemists.[4] Admission to this register is now obtained by passing the necessary examinations.[5] On the presentation of a certificate of qualification the registrar must insert the name of the applicant on the register.[6] It is unlawful for any person not registered as a pharmaceutical chemist to assume or use the title of pharmaceutical chemist or pharmaceutist, or to assume, use, or exhibit any name, title, or sign implying that he is registered under the Act or is a member of the society.[7] To call a shop "The Pharmacy" is not an offence under this section.[8]

SUBSECTION (3).—*Chemists and Druggists.*

1325. By the Pharmacy Act, 1868,[9] provision was made for the establishment of a register of chemists and druggists to be kept by the registrar under the Pharmacy Act, 1852.[10] Examinations are conducted by the examiners appointed under the earlier Act, and successful candidates receive a certificate of competent skill and knowledge and qualification which entitles them to registration. Any registered chemist and druggist may use the name "pharmacist."[11] Any person who takes, uses, or exhibits the name or title of chemist and druggist or chemist or druggist, not being a registered pharmaceutical chemist or chemist and druggist, commits an offence.[12] The use by an unregistered person of the title "technical chemist" is an offence.[1] A body corporate or a firm may use the description of chemist and druggist if the business is managed as provided for in s. 3 (4) of the Poisons and Pharmacy Act, 1908,[2] and if the superintendent, who must be a registered chemist as therein mentioned, is a member of the board of directors or other governing body of the body corporate or of the firm.[3]

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[1] Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 15; see para. 1355, *infra*.

[2] Pharmacy Act, 1852 (15 & 16 Vict. c. 56), s. 1.

[3] *Ibid.*, s. 5.

[4] *Ibid.*, s. 6.

[5] *Ibid.*, s. 8.

[6] *Ibid.*, s. 10.

[7] *Ibid.*, s. 12.

[8] *Pharmaceutical Society of Great Britain* v. *Mercer*, [1910] 1 K.B. 74.

[9] 31 & 32 Vict. c. 121, ss. 6–10.

[10] See para. 1324, *supra*.

[11] Poisons and Pharmacy Act, 1908 (8 Edw. VII. c. 55), s. 3 (3).

[12] 1868 Act, ss. 1 and 15.

SECTION 3.—POISONS.

SUBSECTION (1).—*Definition.*

1326. The articles deemed to be poisons within the meaning of the 1868 Act are set out in Schedule A of the 1908 Act as amended by Orders under the powers contained in s. 2 of the 1868 Act and s. 1 of the 1908 Act. Although it is not expressly stated, the Order may specify in which part of the schedule the article is to be placed;[4] and an article may be transferred from one part to the other.[5]

1327. Part I. of the schedule as amended contains the following list:—Arsenic and its preparations, except preparations for use exclusively in agriculture or horticulture for the destruction of insects, fungi, or bacteria, or as a sheep wash or sheep dip, if the preparations are (1) contained in a closed package or vessel distinctly labelled with a notice of the special purpose for which the preparation is intended, (2) sold upon an order in writing given by or on behalf of a person, firm, or body corporate known to the vendor, and (3) purchased for the purpose of the trade or profession of such person, firm, or body corporate;[6] aconite, aconitine, and their preparations; alkaloids—all poisonous alkaloids not specifically named in this schedule, and their salts, and all poisonous derivatives of alkaloids;[7] atropine and its salts, and their preparations; belladonna, and all preparations or admixtures (except belladonna plaisters) containing 0·1 or more per cent. of belladonna alkaloids; cannabis (the dried flowering or fruiting tops of the pistillate plant of *Cannabis sativa*) and the resins prepared therefrom;[7] cantharides, and its poisonous derivatives; coca, any preparation or admixture of, containing 0·1 or more per cent. of coca alkaloids;[8] corrosive sublimate; cyanide of potassium, and all poisonous cyanides and their preparations; diamorphine (also known as heroin), and all preparations or admixtures containing 0·1 per cent. of diamorphine;[8] digitalin, and all other poisonous constituents of digitalis;[7] ecgonine, and all preparations or admixtures containing 0·1 per cent. of ecgonine;[8] diethyl-barbituric acid, and other alkyl, aryl, or metallic derivatives of barbituric acid, whether described as veronal, proponal, medinal, or by any other trade name, mark, or designation, and all poisonous urethanes and ureides;[1] emetic tartar, and all preparations or admixtures containing 1 or more per cent. of emetic tartar; ergot of rye and preparations of ergots; nux vomica, and all preparations or admixtures containing 0·2 or more per cent. of strychnine; opium, and all preparations or admixtures containing 0·2 or more per cent. of morphine;[2] lead in combination with oleic acid, or other higher fatty acids, whether sold as diachylon or under any other designation (except machine-spread plasters);[3] picrotoxin; prussic acid, and all preparations or admixtures containing 0·1 or more per cent. of prussic acid; savin and its oil, and all preparations or admixtures containing savin or its oil; strophanthin, and all other poisonous constituents of strophanthus;[4] tobacco, any preparations or admixtures containing the poisonous alkaloids of tobacco other than (*a*) tobacco prepared for smoking and snuff, and (*b*) preparations or admixtures of tobacco for use exclusively in agriculture or horticulture for the destruction of insects, fungi, and bacteria (under the same conditions as for arsenic).[5]

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[1] *Bremridge* v. *Hume*, 1895, 23 R. (J.) 9.

[2] 8 Edw. VII. c. 55; see para. 1331, *infra*.

[3] 1908 Act, s. 3 (4).

[4] *Brown* v. *Leggett*, [1906] 1 K.B. 330.

[5] 1908 Act, s. 1 (2).

[6] S.R. & O. 1925 (No. 198), p. 1329; 1926 (No. 861), p. 1135.

[7] S.R. & O. 1925 (No. 198), p. 1329.

[8] S.R. & O. 1920 (No. 2263), ii. p. 519.

1328. Part II. of the schedule as amended contains the following: Almonds, essential oil of (unless deprived of prussic acid); antimonial wine; barium, salts of, except barium sulphate;[4] cantharides, tincture of, and all vesicating liquid preparations or admixtures of; carbolic acid, and liquid preparations of carbolic acid, and its homologues containing more than 3 per cent. of those substances, except preparations for use as sheep wash or for any other purpose in connection with agriculture or horticulture, contained in a closed vessel distinctly labelled with the word "Poisonous," the name and address of the seller, and a notice of the special purposes for which the preparations are intended; chloral hydrate; chloroform, and all preparations or admixtures containing more than 20 per cent. of chloroform; digitalis; mercuric iodide; mercuric sulphocyanide; oxalic acid; poppies, all preparations of, excepting red poppy petals and syrup of red poppies; precipitate, red, and all oxides of mercury; precipitate, white; strophanthus; sulphonal and its homologues, whether described as trional, tetronal, or by any other trade name, mark, or designation;[6] zinc chloride and liquid preparations of zinc chloride, except preparations intended to be used for soldering or other purely industrial purpose, provided that they are contained in closed vessels labelled with the word "Poisonous" and bearing the name and address of the seller and a notice of the special purpose for which the preparations are intended[2]: all preparations or admixtures which are not included in Part I. of the schedule and contain a poison within the meaning of the Pharmacy Acts, except tobacco prepared for smoking and snuff, machine-spread lead plasters, preparations or admixtures, the exclusion of which from the schedule is indicated by the words therein relating to carbolic acid and chloroform, and except such substances as come within the provisions of s. 5 of [the 1908] Act.[1]

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[1] S.R. & O. 1913 (No. 329), p. 1667; 1917 (No. 1294), p. 904.

[2] S.R. & O. 1920 (No. 2263), ii. p. 519.

[3] S.R. & O. 1917 (No. 403), p. 903.

[4] S.R. & O. 1925 (No. 198), p. 1329.

[5] S.R. & O. 1926 (No. 861), p. 1135.

[6] S.R. & O. 1913 (No. 329), p. 1667.

1329. It is to be noted that, while these articles are deemed to be poisons, several of them are defined partly by the use of the word "poisonous." Neither this word nor "poison" is defined in the Acts. In fact, while digitalis and strophanthus are Part II. poisons, "poisonous constituents" of digitalis and strophanthus are Part I. poisons. There appears to be no judicial definition of the word poison. The following definition seems sufficiently wide: "A poison is a substance which, when taken into the mouth or stomach or when absorbed into the blood, is capable of seriously affecting health or of destroying life by its action on the tissues with which it immediately, or after absorption, comes in contact." [2] An article is a poison if it contains any appreciable quantity of a substance appearing in the schedule.[3]

SUBSECTION (2).—*Persons entitled to Supply Poisons.*

1330. It is unlawful for any person to sell or keep an open shop for retailing, dispensing, or compounding poisons, unless he is a registered chemist.[4] There are two different offences. The offence of selling poisons is committed by the person who actually effects the sale. If, therefore, an assistant to a registered chemist sells a poison, unless under the supervision of a registered chemist, he commits an offence and the employer commits none.[5] The offence of keeping an open shop for the retailing, etc., of poisons is committed by the owner of the business,[6] who may be convicted although no actual sale of poisons is proved at all,[7] and even although the sale of poisons is a minute part of the business.[8]

1331. It having been decided that the word "person" in these sections applied only to natural persons, not to companies or firms, and therefore that a company or firm committed no offence by keeping an open shop for the retailing of poisons,[9] special provision was made for these in the 1908 Act. Sec. 3 (4) of that Act provides that a body corporate, and in Scotland a firm or partnership, may carry on the business of a pharmaceutical chemist or chemist and druggist (*a*) if the business, so far as it relates to the keeping, retailing, and dispensing of poisons, is under the control and management of a superintendent [1] who is a registered chemist, and (*b*) if in every premises where such business is carried on and is not personally conducted by the superintendent, such business is *bona fide* conducted under his direction by a manager or assistant who is a registered chemist and whose certificate is exhibited in the shop. Subject to this, the prohibitions in ss. 1 and 15 of the 1868 Act are applied to bodies corporate and firms.

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[1] S.R. & O. 1925 (No. 198), p. 1329; and see para. 1348, *infra.*

[2] Taylor's Medical Jurisprudence, 8th ed., ii. 289.

[3] *Pharmaceutical Society* v. *Piper*, [1893] 1 Q.B. 686; *Pharmaceutical Society* v. *Armson*, [1894] 2 Q.B. 720; *Pharmaceutical Society* v. *Delve*, [1894] 1 Q.B. 71.

[4] 1868 Act, ss. 1 and 15.

[5] *Bremridge* v. *Tomlinson*, 1894, 21 R. (J.) 46; *Pharmaceutical Society* v. *Wheeldon*, 1890, 24 Q.B.D. 683; cf. *Pharmaceutical Society* v. *Potter*, 1897, Glyn-Jones, Law of Poisons and Pharmacy, pp. 163 and 368, where it is suggested that the employer would be guilty also.

[6] *Bremridge* v. *Turnbull*, 1895, 23 R. (J.) 12.

[7] *Bremridge* v. *Tomlinson*, *supra*, per Lord Justice-Clerk Macdonald at p. 48.

[8] *Pharmaceutical Society* v. *Hornsey*, 1894, 10 T.L.R. 492.

[9] *Bremridge* v. *Gray*, 1887, 14 R. (J.) 60; *Pharmaceutical Society* v. *London and Provincial Supply Association*, 1880, 5 App. Cas. 857. In both of those cases the actual sales were conducted by registered chemists.

1332. This subsection departs from the original phrase, "keeping an open shop for the retailing, etc., of poisons," and introduces a new one, "carrying on the business" of a registered chemist. The latter phrase is nowhere defined, for the gloss on the phrase "carrying on the business of a chemist and druggist" in s. 3 of the 1868 Act is obviously not a general definition, but rather a limitation for the particular purpose of the section. It is clear, however, from the opening words of condition (*a*) of s. 3 (4) of the 1908 Act that the keeping, etc., of poisons is regarded by the Legislature as a part only of the business of a registered chemist. At the same time the offence of keeping an open shop for the retailing of poisons might be committed although that formed a very small part of the business.[2] The new phraseology is possibly due to a desire not to hamper unduly the business of large stores where a great part of the business consists of the sale of tooth brushes, etc., while there is only a small department where poisons are sold. It is only this department which need be under the control and management of a superintendent who is a registered chemist.

1333. The phrase "carrying on the business" of a registered chemist is evidently regarded by the Legislature as necessarily including the keeping of an open shop for the retailing of poisons. Otherwise it is difficult to see the purpose of s. 3 (1). That subsection provides that any registered chemist who carries on the business of a registered chemist is guilty of an offence unless in every premises where the business is carried on it is *bona fide* conducted by himself or some other registered chemist. If the business of a registered chemist is carried on although no poisons are sold, the subsection would mean that if an individual registered chemist opened a branch exclusively devoted to the sale of sponges and razor blades he must place a registered chemist in charge. He would therefore be under a heavier burden than a company or a firm which did the same thing, because under s. 3 (4) the superintendent would not require to be a registered chemist. Accordingly, the provisions of s. 3 (1) are probably intended to apply only to premises where poisons are retailed although in fact it does not mention poisons at all.[3] There is a distinction in the subsection between "conducting a business" and "carrying on a business." The business is carried on as a whole by the proprietor, possibly in several branches. It is conducted separately in each branch, either by the proprietor or by a branch manager. It is not sufficient to convict the proprietor of an offence to prove one individual sale effected by an unregistered person; to effect a sale and to conduct a business are different things.[1]

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[1] See para. 1325, *supra*.

[2] *Bremridge* v. *Turnbull*, 1895, 23 R. (J.) 12.

[3] *Linstead* v. *Simpson*, 1927 J.C. 101, per Lord Anderson at p. 106.

1334. This restriction on the right to sell poisons does not affect a registered medical practitioner nor prevent a registered veterinary surgeon from dispensing medicines for animals under his care.[2] Nor does it interfere with the making or dealing in patent medicines—*i.e.* medicines which are the subject of letters patent, not proprietary medicines[3]—or with the business of wholesale dealers in supplying poisons in the ordinary course of wholesale dealing.[4] It is also lawful for executors or trustees to continue the business of a deceased registered chemist provided it is *bona fide* conducted at each branch by a registered chemist.[5]

SUBSECTION (3).—*Method of Dealing in Poisons.*

1335. The provisions with regard to the keeping, dispensing, and selling of poisons generally are contained in the regulations[6] prescribed by the Pharmaceutical Society with the consent of the Privy Council under the powers conferred by s. 1 of the 1868 Act, and in s. 17 of the 1868 Act as amended by the Dangerous Drugs and Poisons (Amendment) Act, 1923.[7]

1336. The regulations of the Pharmaceutical Society, which affect only registered chemists and not other persons who are entitled to supply poisons,[8] are as follows:—

1. That in the keeping of poisons each bottle, vessel, box, or package containing a poison be labelled with the name of the article, and also with some distinctive mark indicating that it contains poison.
2. Also that in the keeping of poisons each poison be kept on one or other of the following systems, viz.:—
    - (*a*) In a bottle or vessel tied over, capped, locked, or otherwise secured in a manner different from that in which bottles or vessels containing ordinary articles are secured in the same warehouse, shop, or dispensary; or
    - (*b*) In a bottle or vessel rendered distinguishable by touch from the bottles or vessels in which ordinary articles are kept in the same warehouse, shop, or dispensary; or
    - (*c*) In a bottle, vessel, box, or package kept in a room or cupboard set apart for dangerous articles.

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[1] *Linstead* v. *Simpson*, 1927 J.C. 101.

[2] 1868 Act, s. 16; Pharmacy Act, 1869 (32 & 33 Vict. c. 117), s. 1.

[3] *Pharmaceutical Society* v. *Piper*, [1893] 1 Q.B. 686; *Pharmaceutical Society* v. *Armson*, [1894] 2 Q.B. 720. A lapsed patent is no defence; *Pharmaceutical Society* v. *Fox*, 1896, 12 T.L.R. 471.

[4] 1868 Act, s. 16.

[5] 1868 Act, s. 16; 1908 Act, s. 3 (2).

[6] Order of 1902, printed S.R. & O. 1913. p. 2364.

[7] 13 & 14 Geo. V. c. 5, ss. 3 and 4.

[8] 1868 Act, s. 16; 1869 Act, s. 1.

3. That in the dispensing and selling of poisons all liniments, embrocations, lotions, and liquid disinfectants containing poison be sent out in bottles rendered distinguishable by touch from ordinary medicine bottles, and that there also be affixed to each such bottle (in addition to the name of the article and to any particular instructions for its use) a label giving notice that the contents of the bottle are not to be taken internally.

1337. Sec. 17 of the 1868 Act was at first of general application and affected all who supplied poisons. Its ambit has, however, been restricted by subsequent legislation. Sec. 3 of the Pharmacy Act, 1869,[1] provides that nothing contained in s. 17 shall apply to any medicine supplied by a legally qualified medical practitioner—*i.e.* a registered medical practitioner[2]—to his patient, or dispensed by any registered chemist, provided such medicine be distinctly labelled with the name and address of the seller,[3] and the ingredients thereof be entered, with the name of the person to whom it is sold or delivered, in a book to be kept by the seller[3] for that purpose. The proviso appears to apply both to the medical practitioner and to the chemist.[4] To bring a case under this exception it must first be shewn that the article supplied was a medicine,[4] "a word comprehensive enough to include everything which is to be applied for the purpose of healing, whether externally or internally."[4] Secondly, "dispensing" means "making up something which is prescribed and selling it with directions how it is to be used."[4]

1338. Sec. 17 falls into six parts. The first regulates the method of selling all poisons. The second applies exclusively to poisons in Part I. of the schedule. The third deals with penalties, and contains a definition of "seller." The fourth gives exemption in certain cases from the provisions of the second part. The fifth deals with medicines dispensed by a registered chemist, and seems to be practically superseded by the wider provisions of s. 3 of the 1869 Act,[5] but it is not repealed. The sixth preserves the effect of the Arsenic Act, 1851.[6]

1339. Part one, as amended by s. 4 (2) of the Dangerous Drugs and Poisons (Amendment) Act, 1923,[7] enacts: "It shall be unlawful to sell any poison either by wholesale or retail unless the box, bottle, vessel, wrapper, or cover in which such poison is contained be distinctly labelled with the name and address of the seller of the poison, with the word 'poison,' and with the name of the poison, and, in the case of a preparation which contains a poison as one of the ingredients thereof, with the proportion which the poison contained in the preparation bears to the total ingredients of the preparation."[1] The seller, whose name must be on the container, is the person on whose behalf the sale is made,[2] *i.e.* the person who keeps the shop or conducts the business,[3] but it is sufficient if his trade name is used.[4] "Seller" is thus defined in connection with s. 17 only, but the same meaning would probably be given to it in provisions which amend s. 17—*e.g.* in the 1869 Act, s. 3; the 1908 Act, s. 5 (1); and the Dangerous Drugs and Poisons (Amendment) Act, 1923,[5] s. 3—but not where the amendment or exemption is from the provisions of ss. 1 and 15 of the 1868, *e.g.* 1908 Act, s. 2.[6]

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[1] 32 & 33 Vict. c. 117.

[2] Medical Act, 1858, s. 34.

[3] On the meaning of the word "seller" see para. 1339, *infra*.

[4] *Berry* v. *Henderson*, 1870, L.R. 5 Q.B. 296, per Lush J. at p. 304. Although it was admitted in argument that s. 3 of the 1869 Act, which came into force on the day of the alleged offence, applied, the judgment proceeds mainly on the exception in s. 17 of the 1868 Act. The case, however, is authority for the points for which it is here cited. See also *Adam* v. *Zomogen Food Products*, 1929 J.C. 22, as to the meaning of the word "medicine."

[5] See para. 1337, *supra*.

[6] 14 & 15 Vict. c. 13; see para. 1347, *infra*.

[7] 13 & 14 Geo. V. c. 5.

1340. Parts two and four deal exclusively with Part I. poisons. Read consecutively, they enact: "It shall be unlawful to sell any poison of those which are in the First Part of Schedule (A) to this Act, or may hereafter be added thereto under section two of the Act, to any person unknown to the seller,[7] unless introduced by some person known to the seller; [7] and on every sale of any such article the seller [7] shall, before delivery, make or cause to be made an entry in a book to be kept for that purpose stating, in the form set forth in Schedule (F) [8] to this Act, the date of the sale, the name and address of the purchaser, the name and quantity of the article sold, and the purpose for which it is stated by the purchaser to be required, to which entry the signature of the purchaser and of the person, if any, who introduced him shall be affixed; . . . but the provisions of this section,[9] which are solely applicable to poisons in the First Part of the Schedule (A) to this Act,[9] or which require that the label shall contain the name and address of the seller, shall not apply to articles to be exported from Great Britain by wholesale dealers, nor to sales by wholesale to retail dealers in the ordinary course of wholesale dealing."

1341. It is not clear what is meant by "the name and quantity of the article sold." The phrase refers back to "any such article," which in turn refers back to any Part I. poison. The heading of the appropriate column in Schedule (F) is "Name and quantity of poison sold." It would accordingly appear that the amount of the actual Part I. poison should be entered. This view is strengthened by the use of the word "article" in part five of the section, where it clearly means a scheduled poison. A judicial opinion has, however, been expressed that the word "article" has different meanings in the section and that in part two it means the entire compound of which the Part I. poison forms a part.[10]

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[1] S.R. & O. 1924 (No. 1403), p. 1532.

[2] Part three of the section.

[3] *Templeman* v. *Trafford*, 1881, 8 Q.B.D. 397.

[4] *Edwards* v. *Pharmaceutical Society*, [1910] 2 K.B. 766.

[5] See para. 1342, *infra*.

[6] See para. 1344, *infra*.

[7] See para. 1339, *supra*.

[8] Schedule amended by Pharmacy Act, 1869, s. 5.

[9] The punctuation here is misleading. If any attention were paid to these commas, the whole section would be restricted to Part I. poisons only.

[10] *Pharmaceutical Society* v. *Piper*, [1893] 1 Q.B. 686, per Collins J. at pp. 696 and 697. The value of this opinion is impaired by the observations of the same judge at p. 699.

1342. Sec. 3 (1) and (3) of the Dangerous Drugs and Poisons (Amendment) Act, 1923,[1] provides that so much of s. 17 as requires an entry in the book to be kept under that section to be signed by the purchaser shall not, if certain conditions are fulfilled, apply where the purchaser is a registered medical practitioner or dentist or veterinary surgeon, and the purchase is made for the purposes of his profession. The conditions, which are set out in subsection (2), are briefly these. The order must be in writing, the seller[2] must be reasonably satisfied as to the genuineness of the signature, and he must enter in his book the words "signed order." In emergency the signed order may be dispensed with if the purchaser undertakes to furnish one within twenty-four hours.

1343. Part three of s. 17 imposes penalties of five pounds for a first and ten pounds for a second or subsequent offence. Although it is not specifically so provided, the penalties may be recovered by the registrar under the Pharmacy Acts.[3] Parts four[4] and five[5] have already been referred to. Part six provides that the provisions of the section and those of the Arsenic Act, 1851,[6] are cumulative.

SUBSECTION (4).—*Poisons for Agricultural and Horticultural Purposes.*

1344. Sec. 2 of the 1908 Act provides that the restriction of the right to sell and the regulations as to the method of selling poisons shall not apply in the case of poisonous substances to be used exclusively in agriculture or horticulture for the destruction of insects, fungi, or bacteria, or as sheep dips or weed killers, which are poisonous by reason of their containing arsenic, tobacco, or the alkaloids of tobacco, if the person so selling or keeping open shop is licensed for the purpose by a local authority and conforms to the regulations made under the section. Since arsenic and tobacco, when sold for these purposes in a closed package or an order in writing, are no longer poisons under the schedule,[7] the ambit of this section is greatly restricted. Weed killer, however, is not an excepted preparation. "The person so selling" means the person who actually effects the sale, so that an unlicensed assistant of a florist is not entitled to effect the sale because his employer has a licence.[8]

1345. The regulations in force[9] provide for the method of application for and issue of licences; that the licence authorises sale only on the premises specified in the licence; that poisonous substances must be kept apart from other goods, and must not, except in special circumstances, be sold in the same premises as articles of food for human consumption. Regulation 14, which has been frequently amended, provides that a poisonous substance must not be sold except in an enclosed vessel or receptacle as received from the manufacturers, which vessel must be of sufficient strength to stand rough usage, securely closed and free from leakage, and distinctly labelled with the name of the substance and the word "poison" and with the name and address of the seller, and also with a notice of the special purpose for which it has been prepared. For the purposes of this regulation the person on whose behalf any sale is made is deemed to be the seller. A person so licensed who sells in breach of the regulations is liable to the penalty imposed by s. 15 of the 1868 Act, although he is also in breach of s. 17.[1] There can be few transactions under the regulations since, if they are observed, the article sold, unless a weed killer, will not as a rule be a poison in view of the exceptions to Schedule A.[2] Such sales, it should be noted, are not exempted from the provisions of the Arsenic Act, 1851.[3]

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[1] 13 & 14 Geo. V. c. 5.

[2] See para. 1339, *supra.*

[3] *Bremridge* v. *Smith*, 1902, 4 F. (J.) 50.

[4] See paras. 1340 *et seq.*, *supra.*

[5] See paras. 1337, 1338, *supra.*

[6] See para. 1346, *infra.*

[7] See para. 1327, *supra.*

[8] *Pharmaceutical Society* v. *Nash*, [1911] 1 K.B. 520 ; see para. 1339, *supra.*

[9] S.R. & O. 1909 (No. 345), p. 617 ; 1911 (No. 1080), p. 292 ; 1920 (No. 2083), ii. p. 521.

SUBSECTION (5).—*Arsenic.*

1346. Arsenic, being with certain exceptions [4] a Part I. poison, is subject to all the rules governing Part I. poisons, but its sale is also specially regulated by the Arsenic Act, 1851.[5] Sec. 17 of the 1868 Act provides that nothing in that Act shall repeal or affect the provisions of the Arsenic Act.

1347. Sec. 1 of the Arsenic Act provides that every person who sells arsenic must, before delivering it, enter or cause to be entered in a book a statement of the sale, with the quantity of arsenic so sold, the purpose for which it is or is stated to be required, the date of the sale, and the name, address, and occupation of the purchaser. The entry must be signed both by the person making it and by the purchaser. By s. 2 no sale may be made to any person unknown to the seller [6] unless the sale is made in the presence of a witness known to the seller [6] who also knows the purchaser. This witness must sign the entry. No sale may be made except to persons of full age. By s. 3 no arsenic may be sold unless mixed with soot or indigo in certain proportions. But if the arsenic is stated to be required, not for use in agriculture, but for some other purpose for which such admixture would render it unfit, it may be sold without admixture in a quantity of not less than ten pounds at any one time. The Act does not apply to the sale of arsenic when it forms part of the ingredients of any medicine [7] required to be made up or compounded according to the prescription of a legally qualified medical practitioner or a member of the medical profession, *i.e.* a registered medical practitioner.[8]

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[1] *Pharmaceutical Society* v. *Jacks*, [1911] 2 K.B. 115.

[2] See para. 1327, *supra*; S.R. & O. 1926 (No. 861), p. 1135.

[3] See para. 1346, *infra*.

[4] See para. 1327, *supra*.

[5] 14 & 15 Vict. c. 13.

[6] "Seller" probably means the person who effects the sale.

[7] See para. 1337, *supra*.

[8] Medical Act, 1858, s. 34. Probably "member of the medical profession" would fall within s. 34.

SECTION 4.—SULPHURIC AND OTHER ACIDS AND AMMONIA.

1348. Certain substances are excepted from the list of poisons in the schedule,[1] and special provision is made for them. These substances are enumerated in s. 5 (2) of the 1908 Act and the Orders [2] made under the power given in that subsection. They are sulphuric acid, hydrochloric acid, soluble salts of oxalic acid, liquid preparations containing more than 5 per cent. by weight of free ammonia,[3] and all liquid preparations sold as carbolic, or carbolic acid, or carbolic substitutes, or carbolic disinfectant, containing not more than 3 per cent. of phenols.[4] It is not lawful [5] to sell any of these substances unless the box, bottle, vessel, wrapper, or cover in which it is contained is distinctly labelled with the name of the substance, the word "poisonous," the name and address of the seller,[6] and the words "not to be taken." [7] A liquid must be in bottles distinguishable by touch from ordinary bottles.[7]

SECTION 5.—DANGEROUS DRUGS.

1349. The Dangerous Drugs Acts, 1920 to 1925, and the regulations made thereunder place under severe restriction the right to deal in the drugs to which they apply. All of these drugs are scheduled poisons, and therefore fall under the provisions of the Acts of 1868 and 1908. The Dangerous Drugs Act, 1920,[8] is in four Parts. Part I. deals with raw opium and certain other substances; Part II. with prepared opium; and Part III. with cocaine, morphine, and other drugs; while Part IV. is administrative.

1350. The substances to which Part I. applies are raw opium, including powdered or granulated opium but not medicinal opium,[9] coca leaves, Indian hemp and resins obtained from Indian hemp, and all preparations of which such resins form the base.[10] These may not be imported into or exported from the United Kingdom except under licence and by approved ports.[11] Power is given to regulate the production, possession, sale, and distribution. Put broadly, the effect of the regulations [12] is this: No person may supply or be in possession of any of these substances unless licensed by the Secretary of State or authorised by the regulations. A general authorisation, so far as necessary for the practice of his profession or special employment, is given to any duly qualified medical practitioner (*i.e.* registered medical practitioner,)[13] any person lawfully keeping an open shop for the retailing of poisons,

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[1] At end of Part II.

[2] S.R. & O. 1911 (No. 664), p. 291; 1912 (No. 1512), p. 1077.

[3] Added by 1911 Order.

[4] Added by 1912 Order.

[5] Sec. 5 (1).

[6] See para. 1339, *supra*.

[7] Added by S.R. & O. 1911 (No. 262), p. 290.

[8] 10 & 11 Geo. V. c. 46.

[9] Sec. 15 (1).

[10] Added by the Dangerous Drugs Act, 1925 (15 & 16 Geo. V. c. 74), s. 1, which came into operation on 25th September 1928 (S.R. & O. 1928 (No. 634), p. 430).

[11] 1920 Act, ss. 1 and 2 (1), as amended by 1925 Act, s. 2.

[12] S.R. & O. 1921 (No. 864), p. 140; 1922 (No. 1086), p. 170; 1924 (No. 1293), p. 235; 1928 (No. 98), p. 431.

[13] Medical Act, 1858, s. 34.

(*i.e.* a registered chemist),[1] any person employed or engaged in dispensing medicines[2] at any public hospital or other public institution, being a registered chemist,[1] any registered veterinary surgeon, any person in charge of a research laboratory, and any public analyst. Every person who supplies these substances must enter all his dealings in a register, which must be preserved for two years after the last entry.

1351. Part II prohibits the importation and exportation of prepared opium, *i.e.* prepared for smoking,[3] and makes it an offence for any person to have prepared opium in his possession.[4]

1352. Part III. applies to morphine, cocaine (including synthetic cocaine), ecgonine, diacetylmorphine (diamorphine or heroin), and their respective salts, medicinal opium, *i.e.* raw opium adapted for medicinal use in accordance with the requirements of the British Pharmacopœia,[5] and any extract or tincture of Indian hemp, and any other substance containing any proportion of diacetylmorphine or containing not less than one-fifth per cent. of morphine or one-tenth per cent. of cocaine or ecgonine,[6] benzoyl-morphine, dihydro-oxycodeinone, dihydrocodeinone, and their respective salts, and any preparation or extract containing them,[7] esters of morphine and their respective salts and any preparation, admixture, or extract containing any of the said esters.[8] None of these may be imported or exported except under licence.[9] Power is given to make regulations,[10] and the effect of the regulations[11] is as follows: No person may manufacture, supply, or procure these drugs unless he is authorised. Drugs may be "procured" although they are never actually in the United Kingdom.[12] A general authority is given to registered chemists to manufacture any preparation of the drugs and to retail and dispense, but they must be kept in a locked receptacle. A general authority is also given to the persons who have a general authority to possess opium[13] and also to registered dentists. But these general authorities are subject to three conditions. (*a*) The drugs may be supplied to a person not authorised to be in possession of them only in one of two ways. First, they may be dispensed on a prescription[14] given by a registered medical practitioner, dentist, or veterinary surgeon, and such prescriptions are subject to many rules which do not apply to ordinary prescriptions. Secondly, they may be supplied by a registered medical practitioner, dentist, or veterinary surgeon who dispenses his own medicines.[14] (*b*) The container must be plainly marked with the amount of the drug it contains. This does not apply to a preparation dispensed on a prescription. (*c*) Every person who supplies must keep a record of his transactions.

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[1] See para. 1323, *supra*.

[2] See para. 1337, *supra*.

[3] Sec. 15 (1).

[4] Sec. 5.

[5] 1925 Act, s. 4 (1).

[6] Sec. 8, as amended by the 1925 Act, s. 3.

[7] S.R. & O. 1928 (No. 644), p. 432.

[8] S.R. & O. 1929 (No. 650).

[9] Sec. 6.

[10] Sec. 7.

[11] Dangerous Drugs (Consolidation) Regulations, 1928; S.R. & O. 1928 (No. 981), p. 434.

[12] *R.* v. *Yasukichi Miyagawa*, [1924] 1 K.B. 614.

[13] See para. 1350, *supra*.

[14] *Strathern* v. *Ross*, 1927 J.C. 70.

Administration direct by a registered medical practitioner or dentist is not supplying, and no record need be kept in such cases.[1]

1353. Part IV. of the Act is general. It gives power to constables and other persons authorised to enter premises and inspect registers and stocks.[2] The penalty for a breach of the Act or any regulation is, on conviction on indictment, a fine not exceeding £1000 or penal servitude for a period not exceeding ten years, or both.[3] The onus of proving that he has a licence is placed upon the accused.[4]

SECTION 6.—THERAPEUTIC SUBSTANCES.

1354. The Therapeutic Substances Act, 1925,[5] applies to substances commonly known as vaccines, sera, toxins, antitoxins and antigens, salvarsan, insulin, and preparations of the posterior lobe of the pituitary body intended for use by injection.[6] These are substances the purity or potency of which cannot be adequately tested by chemical means. They may be manufactured only by a person who holds a licence. They may not, as a rule, be imported unless they attain the prescribed standard of strength, quality, and purity.[7] A joint committee is set up to frame regulations.[8] The regulations [9] make provision with regard to licences to manufacture, the names of therapeutic substances, containers, labels, etc., standards of strength, quality, and purity, and tests for determining whether those standards have been attained, export and import, research licences and therapeutic substances intended for veterinary purposes only.

SECTION 7.—THE BRITISH PHARMACOPŒIA.

1355. The General Council of Medical Education and Registration [10] has the duty and the exclusive right of publishing the British Pharmacopœia. This contains a list of medicines and compounds and the manner of preparing them, together with the true weights and measures by which they are to be prepared and mixed.[11] It is an offence to compound any medicines of the Pharmacopœia except according to its formularies.[12] Further, it is *prima facie* an offence against s. 2 of the Food and Drugs (Adulteration) Act, 1928,[13] to sell any drug in the Pharmacopœia which is not of the ingredients and in the proportions prescribed by the Pharmacopœia.[14] A failure to observe the directions of the Pharmacopœia may found a charge of culpable homicide.[15]

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[1] Para. 11 (7) (i); *Kingsbury* v. *Director of Public Prosecutions*, 1926, 43 T.L.R. 79.

[2] 1920 Act, s. 10, as amended by 1923 Act, s. 1.

[3] 1920 Act, s. 13, as amended by 1923 Act, s. 2.

[4] 1923 Act, s. 2 (3).

[5] 15 & 16 Geo. V. c. 60.

[6] Sec. 1 and Schedule.

[7] Secs. 2 and 3.

[8] Sec. 5.

[9] S.R. & O. 1927 (No. 486), p. 1776.

[10] See para. 1297, *supra*.

[11] Medical Act, 1858, s. 54; Medical Act, 1862 (25 & 26 Vict. c. 91), ss. 2 and 3.

[12] Pharmacy Act, 1868, s. 15.

[13] 18 & 19 Geo. V. c. 31.

[14] *Dickens* v. *Randerson*, [1901] 1 Q.B. 437; *Boots Cash Chemists (Southern), Ltd.* v. *Cowling*, 1903, 19 T.L.R. 370; *Hudson* v. *Bridge*, 1903, 19 T.L.R. 369; see FOOD AND DRUGS, Vol. VII. p. 163 at p. 166.

[15] *Wheatley*, 1853, 1 Irv. 225; see para. 1358, *infra*.

SECTION 8.—STAMPS.

1356. By the Stamp Act, 1804,[1] as amended by the Medicine Stamp Act, 1812,[2] duties must be paid on the drugs, etc., mentioned in those Acts. The nature of the articles which fall under these Acts is discussed in the undernoted case.[3]

SECTION 9.—NEGLIGENCE.

SUBSECTION (1).—*Civil Liability.*

1357. A contract for the sale of a drug falls under the ordinary law of sale, and therefore the implied conditions imposed by s. 14 of the Sale of Goods Act, 1893,[4] apply (see SALE OF GOODS). Apart from contractual liability by statute a chemist is in the same position as others who hold themselves out as possessing special qualifications.[5] He is liable to anyone who is injured through his negligence, *e.g.* in making up a prescription wrongly, and he owes a duty, not only to the person who buys from him, but to any person into whose hands the article may come.[6] This liability, which is based upon the fact that he is a dealer in dangerous things,[6] probably extends to proprietary articles sold as received from the manufacturer, with regard to the actual quality and condition of which the retailer can have no knowledge.[6] If a chemist takes upon himself to advise the use of a certain drug and injury is caused by the use of it, he may be liable.[7]

SUBSECTION (2).—*Criminal Liability.*

1358. A chemist supplying drugs may be guilty of culpable homicide or neglect of duty.[8] To dispense the wrong drug and so cause death is culpable homicide unless the accused can shew some circumstance absolving him from criminal responsibility.[9] If injury or death is caused through the use, in making up a prescription, of drugs not of the strength of the British Pharmacopœia,[10] or through keeping poisons mixed up with harmless drugs and thereby using the wrong drug,[11] an indictment for culpable breach of duty or homicide would lie.

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[1] 44 Geo. III. c. 98.

[2] 52 Geo. III. c. 150.

[3] *Adam* v. *Zomogen Food Products, Ltd.*, 1929 J.C. 23.

[4] 56 & 57 Vict. c. 71.

[5] Beven on Negligence, 4th ed., ii. 1361.

[6] *Mullen* v. *A. G. Barr & Co.*, 1929 S.C. 461.

[7] *Rosen* v. *Stephen*, 1907, 14 S.L.T. 784.

[8] Macdonald's Criminal Law, 4th ed., pp. 208 and 209.

[9] *H.M. Adv.* v. *Wood*, 1903, 4 Adam 150.

[10] *Wheatley*, 1853, 1 Irv. 225.

[11] *H.M. Adv.* v. *Armitage*, 1885, 5 Coup. 675.

MEDITATIO FUGÆ.

See DILIGENCE OF CREDITORS.

MEETINGS.

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SECTION 1.—INTRODUCTORY.

1359. Meetings may be convened for any lawful purpose. There is no right in the public to hold meetings as such in the streets, and where an obstruction is caused by a meeting in the street, an offence is committed by those holding it.[1] Where a meeting is held in a hall, theatre, or such place, any regulations or by-laws applicable to the use of the building must be observed. The presence of two persons is necessary to constitute a meeting.[2] One shareholder holding a proxy from another does not constitute a meeting.[3] Where a *quorum* is specified as requisite to enable a valid meeting to be held, it must consist of members qualified to take part in and to decide upon the business before the meeting; and the *quorum* must be present not only at the commencement of the proceedings but also at the time when the business is transacted.[4]

SECTION 2.—MEETINGS OF STATUTORY AND SIMILAR BODIES.

1360. In the case of meetings falling under this head, the convening of the meetings and the procedure followed thereat are, as a rule, regulated by the statute, charter, or constitution under which the body acts. Due and adequate notice of the meeting, and of the business to be transacted thereat, must be given in accordance with the legal or customary requirements of the body to each member entitled to be present. Failure to give notice, or to give adequate notice, may vitiate the proceedings at the meeting and nullify the acts done thereat.[5] Where a specified number of days' notice was required to be given, it was held that the day on which the meeting was held might be reckoned as one of the days in computing the time.[1] The chairman has a general control over the proceedings. Should he leave the meeting a new chairman must be appointed before further business is proceeded with.[2] All qualified members of the body are entitled to be present and to express their views on any question properly before the meeting. Any member who persists in disorderly interruption may be ordered by the chairman to withdraw; and should he refuse to do so, may be ejected with such force as is reasonably necessary.

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[1] *M'Ara* v. *Mags. of Edinburgh*, 1913 S.C. 1059; *Aldred* v. *Miller*, 1924 S.C. (J.) 117.

[2] *Sharp* v. *Dawes*, 1876, 2 Q.B.D. 26.

[3] *In re Sanitary Carbon Co.*, 1877, W.N. 223.

[4] *Henderson* v. *Louttit & Co.*, 1894, 21 R. 674.

[5] *North of Scotland and Orkney and Shetland Steam Navigation Co.*, 1920 S.C. 94; Crew, Meetings, 10th ed., p. 7.

SECTION 3.—OTHER MEETINGS.

1361. Where a meeting is convened for political, social, or other purposes by persons upon whom no legal duty rests to hold such meeting, its conduct and control are in the discretion of the conveners. Those attending are present by licence of the conveners, whether the meeting is open to the public or only to a particular class, and whether or not a charge is made for admission. The licence may be recalled at any time. Should the licence be withdrawn the person must leave the meeting. Where a charge has been made for admission, repayment of such charge cannot be insisted on as a condition of withdrawal,[3] the appropriate remedy being an action for breach of contract.[4] Should the person required to withdraw refuse to do so, he may be ejected with such force as is reasonably necessary. If he uses violence towards those ejecting him, he commits a breach of the peace. There would appear to be no obligation upon the conveners of the meeting to afford anyone dissenting from their views an opportunity of speaking.[5] Except where the right to give a casting vote is given by custom, or by the constitution governing the proceedings of the body, the chairman does not have a double vote.[6] A right to a poll is by common law incident to any election by show of hands at a public meeting.[7]

SECTION 4.—ADMISSION OF PRESS TO MEETINGS.

1362. The Local Authorities (Admission of the Press to Meetings) Act, 1908,[8] provides for the admission of the Press to the meetings of every local authority (s. 1), *i.e.* a county council, a town council, a parish council, an education authority, a district committee under the Local Government (Scotland) Acts, a central body and a distress committee under the Unemployed Workmen Act, 1905,[9] and any other local body, board, joint board, or a committee which has power to impose a rate (as defined in the Act, s. 2), and which does not require to report its proceedings to any other local authority (s. 6). The local authority may, by special resolution of a majority, exclude temporarily the Press where, in view of the special nature of the business, it is of opinion that this is advisable in the public interest (s. 1). The Act does not extend to a meeting of a committee of a local authority unless the committee itself falls within the definition of a "local authority" given by the Act.

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[1] *Aberdeen Comb Works Co.*, 1902, 10 S.L.T. 210.

[2] *Anderson* v. *Robertson*, 1827, 6 S. 235.

[3] *Wood* v. *Leadbitter*, 1845, 13 M. & W. 838; but see also *Hurst* v. *Picture Theatres, Ltd.*, 1914, 30 T.L.R. 643.

[4] *Kerrison* v. *Smith*, [1897] 2 Q.B. 445.

[5] Blackwell, Law of Meetings, 6th ed., p. 9.

[6] *Stirling* v. *Campbell*, 1816, 6 Pat. 238.

[7] *Campbell* v. *Maund*, 1836, 5 A. & E. 865.

[8] 8 Edw. VII. c. 43.

[9] 5 Edw. VII. c. 18.

SECTION 5.—DISTURBANCE AT PUBLIC MEETINGS.

1363. The Public Meeting Act, 1908,[1] provides that any person who at a lawful public meeting acts in a disorderly manner for the purpose of preventing the transaction of the business for which the meeting was convened is guilty of an offence. If the offence is committed at a political meeting held in any parliamentary constituency between the date of the issue of a writ for an election and the date at which the return to such writ is made, he is guilty of an illegal practice within the meaning of the Corrupt and Illegal Practices Prevention Act, 1883;[2] in any other case he is, on summary conviction, liable to a fine not exceeding £5, or to imprisonment not exceeding one month (s. 1 (1)). Any person who incites others to commit an offence under the Act is guilty of a like offence (s. 1 (2)). The fact that a meeting is held on the highway does not *per se* render it illegal, to the effect of rendering the provisions of the Act inapplicable.[3]

SECTION 6.—MOTIONS.

SUBSECTION (1).—*In General.*

1364. A motion is a proposal submitted for adoption or approval at a meeting. It requires to be moved and seconded, and it must comply with the requirements of the body as to notice. It is finally put to the meeting by the chairman, with or without amendment, and the meeting either adopts it unanimously, or votes upon it in accordance with the practice of the particular body.

SUBSECTION (2).—*Previous Question.*

1365. In proceedings at public meetings the motion "that the motion before the meeting be not now put" is called the "previous question." Its object is to prevent the motion before the meeting being put to the vote, and it is so called because it temporarily becomes the motion, suspending consideration of the original motion and requiring previous decision as to whether the original motion shall be put to the vote at all. If the previous question is defeated the meeting proceeds to vote upon the original motion: should the previous question be carried the original motion cannot be proceeded with at that meeting.

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[1] 8 Edw. VII. c. 66.

[2] 46 & 47 Vict. c. 51.

[3] *Burden* v. *Rigler*, [1911] 1 K.B. 337.

SUBSECTION (3).—*Closure.*

1366. Where it is desired to terminate the discussion upon a motion and to have it at once put to the vote, the "closure" is moved. Where the closure is carried, the motion before the meeting must be at once put to the vote. It is not, however, competent for the majority at any meeting to employ the closure as a means of preventing the minority entirely from expressing their views. But when the minority have had a reasonable opportunity of stating their views, further discussion may competently be prevented by means of the closure.[1]

SUBSECTION (4).—*Amendment of Motion.*

1367. An amendment may be defined as any alteration of, addition to, or omission from any motion submitted to the meeting. An amendment must be relevant to the motion and must be moved and seconded. It cannot be moved or seconded by the mover or seconder of the motion, but may be discussed by them. It should not amount to a direct contradiction of the motion, the proper course for opponents of the motion being to vote against it. Where several amendments have been moved and seconded the chairman decides the order in which they are to be taken. If the chairman improperly refuses to put an amendment, the motion, if passed, may be set aside.[2] Amendments should be dealt with in logical order. In general this will be in the order of the clauses of the motion sought to be amended: but where the effect of an amendment is dependent on the fate of an amendment to a subsequent part of the motion, the latter amendment takes precedence. After each amendment in turn has been disposed of, the motion with or without amendment, as the case may be, is read by the chairman. Further amendments may then be proposed provided they do not reopen questions already disposed of. When it is proposed to amend an amendment, the amendment becomes for the time being the substantive motion—amendments to which are disposed of in the same way as amendments to an original motion. Finally the motion, whether modified or not by amendments or amended amendments, is put to the meeting.

SECTION 7.—MINUTES OF MEETINGS.

1368. At common law the minutes of meeting are nothing more than a note of what takes place at the meeting, more or less regular and complete, but they do not prove themselves. Their correctness requires to be established by the writer of them, or by someone present at the meeting of which they are a record, before they are admissible as evidence.[3] When proved to be genuine and correct they form competent evidence of the transactions recorded. In certain cases, however, minutes of meetings of bodies of a public nature have been admitted as necessary evidence of their proceedings, apparently on the ground that the bodies had a recognised legal status and that the compilation of the minutes was in the hands of qualified persons under due supervision.[1] This has been held in the case of minutes of meeting of a Senatus Academicus,[2] of road trustees,[3] and of a hospital.[4] It is apparently undecided whether it is essential in every case that minutes should be signed to render them admissible as evidence,[5] though it has been held that a minute of meeting of Justices of the Peace should be signed.[6] Minutes of meeting have been held to be competent evidence as against the body of whose proceedings they are a record.[7] They are not, however, conclusive against third parties.[8]

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[1] *Wall* v. *London and Northern Assets Corporation*, [1898] 2 Ch. 469.

[2] *Henderson* v. *Bank of Australasia*, 1890, 45 Ch.D. 330.

[3] *City of Glasgow Bank Liquidators*, 1880, 7 R. 1196.

1369. In the case of minutes of statutory bodies or of minutes kept under statutory provisions, their value as evidence is dependent upon the terms of the statute under which they are made. They may be *prima facie* evidence of the proceedings of which they are a record, as *e.g.* under the Companies Act 1929,[9] s. 120; or they may form conclusive evidence which cannot competently be contradicted by parole evidence.[10] The minutes of a meeting cannot, however, be exclusive evidence of the proceedings thereat, and an act or resolution unrecorded in the minutes may be proved by parole.[11]

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[1] Dickson, Evidence, s. 1215.

[2] *Hamilton* v. *Hope*, 1827, 4 Mur. 239.

[3] *M'Ghie* v. *M'Kirdy*, 1850, 12 D. 442.

[4] *Wilson* v. *Jamieson*, 1827, 4 Mur. 366; *Oswald* v. *Lawrie*, 1828, 5 Mur. 8.

[5] *Ivison* v. *Edinburgh Silk Yarn Co.*, 1846, 9 D. 1039; *Forbes* v. *Morison*, 1851, 14 D. 134; *Oswald* v. *Lawrie*, *supra*.

[6] *Lord Blantyre* v. *Dickson*, 1885, 13 R. 116.

[7] *Ivison*, *supra*.

[8] *Cameron* v. *Panton's Trs.*, 1891, 18 R. 728.

[9] 19 & 20 Geo. V. c. 23.

[10] *City of Glasgow Bank Liquidators*, 1880, 7 R. 1196.

[11] *In re Fireproof Doors, Ltd.*, [1916] 2 Ch. 143.

MELIOR EST CONDITIO POSSIDENTIS VEL DEFENDENTIS.

See MAXIMS.

MELIORATIONS.

See AGRICULTURAL HOLDINGS ACTS; ENTAIL; LEASES; LIFERENT AND FEE; SMALL LANDHOLDERS.

MEMBER OF PARLIAMENT.

See PARLIAMENT.

MEMORANDUM OF ASSOCIATION.

See COMPANY.

MENTAL DEFICIENCY.

See INSANITY AND LUNACY.

MERCANTILE AGENT.

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MERCHANDISE MARKS ACTS.

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SECTION 1.—INTRODUCTORY.

SUBSECTION (1).—*Statutes at Present in Force.*

1370. The statutes relating to merchandise marks which are at present wholly or partly in force in Scotland are as follows: The Merchandise Marks Act, 1887;[1] The Merchandise Marks Act, 1891;[2] The Merchandise Marks (Prosecutions) Act, 1894;[3] The Board of Agriculture and Fisheries Act, 1903;[4] The Geneva Convention Act, 1911;[5] The Merchandise Marks Act, 1911;[6] The Small Landholders (Scotland) Act, 1911;[7] The Anglo-Portuguese Commercial Treaty Acts, 1914[8] and 1916;[9] The "Anzac" (Restriction on Trade Use of Word) Act, 1916;[10] The Merchandise Marks Act, 1926;[11] The Agricultural Produce (Grading and Marking) Act, 1928.[12]

SUBSECTION (2).—*Scope and Purposes of Statutes.*

1371. The Merchandise Marks Act, 1887, and its amending statutes are ancillary to the law of trade marks, and are intended to render the protection of trade marks effectual. The common law, and a prior statute of 1862,[13] proved ineffectual for this purpose,[14] and, following upon an International Convention for the Protection of Industrial Property of 1884, and the Report of a Committee in 1887, the Act of 1887 was passed. It repealed the Act of 1862 and established a criminal law of false marking. A few minor provisions also affected the civil law. Between 1887 and 1926 some procedure and departmental changes were made, and the machinery of the statute was applied to the protection of certain Portuguese wines, to the Geneva Red Cross, and to the word "Anzac." By the Act of 1926 a new principle was introduced —the requirement of an indication of origin,[15] for the protection of British manufactures. For the encouragement of efficiency in British agricultural production, and the protection of consumers, the Act of 1928 introduced the principle of requiring indications of the grade or quality of agricultural products.[16]

SECTION 2.—FRAUDULENT MARKING.

SUBSECTION (1).—*Definitions.*[17]

1372. "Goods" means anything which is the subject of trade, manufacture, or merchandise. "Trade mark" means a trade mark, registered in the register of trade marks kept under the Patents, Designs, and Trade Marks Act, 1883,[1] or protected, with or without registration, in any British possession or foreign state to which the provisions of s. 103 of the 1887 Act (or of s. 91 of the Patents and Designs Act, 1907 [2]) have been applied by Order in Council.[3] "Trade description" means any description, statement, or other indication, direct or indirect, as to (*a*) the number, quantity, measure, gauge, or weight of any goods; or (*b*) the place or country in which any goods were made or produced; or (*c*) the mode of manufacturing or producing any goods; or (*d*) the material of which any goods are composed; or (*e*) as to any goods being the subject of an existing patent, privilege, or copyright; and the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, is a "trade description." "False trade description" is one which is false in a material respect as regards the goods to which it is applied, and includes alterations by addition, effacement, or otherwise, making the description false in a material respect. It may be false although it is a trade mark or part of a trade mark. A false customs entry is also a "false trade description." [4] The use of the word "patent" in a description after the patent has expired is not necessarily an offence.[5]

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[1] 50 & 51 Vict. c. 28.

[2] 54 & 55 Vict. c. 15 (Procedure).

[3] 57 & 58 Vict. c. 19.

[4] 3 Edw. VII. c. 31, s. 1 (8).

[5] 1 & 2 Geo. V. c. 20.

[6] 1 & 2 Geo. V. c. 31.

[7] 1 & 2 Geo. V. c. 49, s. 4 (11) and First Schedule.

[8] 5 & 6 Geo. V. c. 1.

[9] 6 & 7 Geo. V. c. 39.

[10] 6 & 7 Geo. V. c. 51.

[11] 16 & 17 Geo. V. c. 53.

[12] 18 & 19 Geo. V. c. 19.

[13] 25 & 26 Vict. c. 88.

[14] Kerly on Trade Marks, 6th ed., pp. 16–18.

[15] Section 3, *infra.*

[16] Section 4, *infra.*

[17] 50 & 51 Vict. c. 28, s. 3 (1).

1373. Examples of false trade descriptions are: "guaranteed hand-made," applied to machine-made cigarettes; [6] the letters "N.M.," orally explained to mean New Zealand mutton and applied to Argentine mutton; [7] "soda crystals," which by the usage of trade is confined to washing soda, when applied to Glauber's salt (although literally correct); [8] "fine British Tarragona wine," applied to a mixture 85 per cent. of which was a wine made and prepared in England from dried raisins and 15 per cent. of which was Mistella, a heavy form of Tarragona wine used solely for blending purposes.[9] "Port" or "Madeira" applied to any wine or liquor other than produce of Portugal or Madeira,[10] and further, "port" applied to Portuguese wine imported into the United Kingdom and not accompanied by a certificate by the competent Portuguese authorities that it is "port" under the law of Portugal,[11] are false trade descriptions. It is a false description even if "port" is qualified by another word.[12] But a purely oral description cannot be a "false trade description," although it may become so if supplemented by an invoice.[13]

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[1] Now the Trade Marks Acts, 1905 to 1919.

[2] 7 Edw. VII. c. 29.

[3] See Index to S.R. & O. 1927, pp. 866–7.

[4] Merchandise Marks Act, 1891 (54 & 55 Vict. c. 15), s. 1.

[5] *Gridley* v. *Swinborne*, 1888, 5 T.L.R. 71.

[6] *Kirschenboim* v. *Salmon & Gluckstein, Ltd.*, [1898] 2 Q.B. 19.

[7] *Cameron* v. *Wiggins*, [1901] 1 K.B. 1.

[8] *Fowler* v. *Cripps*, [1906] 1 K.B. 16.

[9] *Holmes* v. *Pipers, Ltd.*, [1914] 1 K.B. 57.

[10] Anglo-Portuguese Commercial Treaty Act, 1914 (5 & 6 Geo. V. c. 1), s. 1.

[11] Anglo-Portuguese Commercial Treaty Act, 1916 (6 & 7 Geo. V. c. 39), s. 1.

[12] *Sandeman* v. *Gold*, [1924] 1 K.B. 107.

[13] *Coppin* v. *Moore* (No. 1), [1898] 2 Q.B. 300.

SUBSECTION (2).—*Offences.*

(i) *Forging Trade Mark; Making Dies, etc.*[1]

1374. Forging a trade mark, making that trade mark, or a mark so nearly resembling it as to be calculated to deceive, without the assent of the proprietor (the burden of proving which lies on the accused); or falsifying any trade mark, by alteration, addition, effacement, or otherwise, is an offence. So also are making, disposing of, or possessing a die, block, machine, or other instrument for forging, or for being used for forging, a trade mark.

(ii) *Falsely Applying Trade Mark.*

1375. Falsely applying to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, is an offence.[2] Applying [3] may be either (*a*) applying to the goods themselves or (*b*) applying to any covering, label, reel, or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade, or manufacture, or (*c*) by placing, enclosing, or annexing any goods sold or exposed or possessed for such purposes, in, with, or to, any covering, label, reel, or other thing to which a trade mark (or trade description) has been applied, or (*d*) by using the mark (or description) in a way calculated to lead to the belief that the goods are designated or described by it. Applying without the assent of the proprietor, which assent must be proved by the accused, is "falsely applying." [4] Delivery of an invoice with the goods may be application.[5] Filling bottles, embossed with A.'s name, with beer brewed by B., although B.'s label was attached, has been held to be application.[6]

(iii) *Applying False Trade Description.*[7]

1376. Applying [8] any false trade description [9] to goods is an offence. The provisions of the Act as to application of a false trade description extend to the application of any figure, word, mark, or arrangement or combination of these, whether including a trade mark or not, which is reasonably calculated to lead to the belief that the goods are the manufacture or merchandise of a wrong person,[10] and extend to the application to goods of any false name or initials of a person, *i.e.* which (*a*) are not a trade mark or part of a trade mark, and (*b*) are identical with or a colourable imitation of the name or initials of a person carrying on business in connection with goods of the same description who has not authorised such use, and [1] (*c*) are those of a fictitious person or some person not *bona fide* carrying on business in connection with such goods; and the provisions of the Act as applied to goods also extend to goods with the false name or initials of a person applied, all as if such name or initials were a trade description.[2] Use of a false trade name, however, is a distinct offence and is not relevantly libelled as a false trade description.[3]

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[1] 1887 Act, ss. 2 (1) (*a*) and (*c*), 2 (2), 4.

[2] *Ibid.*, s. 2 (1) (*b*).

[3] *Ibid.*, s. 5.

[4] *Ibid.*, s. 5 (3).

[5] *Budd* v. *Lucas*, [1891] 1 Q.B. 408; *Coppin* v. *Moore* (No. 1), [1898] 2 Q.B. 300.

[6] *Burns* v. *Turner*, 1897, 2 Adam 450; *Haddow* v. *Neilson Bros.*, 1899, 3 Adam 104; *Stone* v. *Burn*, [1911] 1 K.B. 927.

[7] 1887 Act, s. 2 (1) (*d*).

[8] See preceding paragraph.

[9] See para. 1372, *supra*, and *Langley* v. *Bombay Tea Co.*, [1900] 2 Q.B. 460.

[10] 1887 Act, s. 3 (2).

(iv) *Causing and being Accessory.*

1377. Causing any of the above offences to be committed,[4] and being accessory from within to the commission outwith the United Kingdom of any offence under the Acts, are equivalent to committing the principal offence.[5]

(v) *Selling, Exposing, etc., Falsely Marked Goods.*[6]

1378. Selling, and exposing or keeping for sale or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied,[7] or to which any trade mark, or mark so similar as to be calculated to deceive, is falsely applied, are offences. It has been questioned whether this offence can be committed unless the mark or description is stamped upon or attached by label to the article.[8]

(vi) *False Representation as to Royal Warrant, etc.*[9]

1379. Falsely representing that any goods are made by a person holding a Royal Warrant, or for the service of His Majesty or any of the Royal Family, or any Government Department, is an offence involving a maximum penalty of £20 on summary conviction.

SUBSECTION (3).—*Penalties.*[10]

1380. For offences under the Act (other than that described in the preceding paragraph) the penalties are: (*a*) on conviction on indictment, imprisonment with or without hard labour up to two years, or a fine, or imprisonment and fine; and (*b*) on summary conviction, imprisonment with or without hard labour up to four months, or a maximum fine of £20, and on second or subsequent conviction, such imprisonment up to six months, or a maximum fine of £50. In every case, every article, instrument, or thing, by means of or in relation to which the offence was committed, is subject to forfeiture.

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[1] Read disjunctively, *Lipton* v. *The Queen*, 1892, L.R. Ir. 32 Q.B.D. 115; *D. & J. M'Callum* v. *Doughty*, 1915, 7 Adam 645.

[2] 1887 Act, s. 3 (3).

[3] *D. & J. M'Callum* v. *Doughty*, *supra*.

[4] 1887 Act, s. 2 (1) (*f*).

[5] *Ibid.*, s. 11.

[6] *Ibid.*, s. 2 (2).

[7] See para. 1375, *supra*.

[8] *H.M. Advocate* v. *Jacob*, 1908, 5 Adam 586; *H.M. Advocate* v. *Suits, Ltd.*, 1908 S.C. 1163.

[9] 1887 Act, s. 20.

[10] *Ibid.*, s. 2 (3).

SUBSECTION (4).—*Special Defences.*

(i) *Saving of Existing Practices.*[1]

1381. On charges involving false trade description [2] an accused may prove that the trade description was, at the passing of the Act, generally and lawfully applied to indicate the particular class or method of manufacture of the goods, in which case the offence is excluded. But if the name of a place or country be included in such trade description so as to mislead as to the place of origin, then, in order that this defence may be pleaded, the place of origin and a statement that it is the place of origin must have been added, conspicuously, to the trade description.

(ii) *No Intent to Defraud.*

1382. On charges of forgery, etc., falsely applying a trade mark, applying a false trade description, and causing any of these offences to be committed,[3] an accused may prove that he acted without intent to defraud.[4] Intent to make a purchaser take something he does not mean to take, although it may be equally good, is intent to defraud.[5]

(iii) *Reasonable Precautions, or Innocence.*

1383. Charged with selling, etc., goods to which a mark or description is falsely applied,[6] an accused may prove that, having taken all reasonable precautions against committing an offence, he had no reason to suspect the genuineness of the trade mark, mark, or trade description, and on demand gave to the prosecutor all the information in his power regarding the persons from whom he obtained the goods; or, alternatively, that otherwise he acted innocently.[7] Intent to defraud is not, however, a necessary ingredient of this class of offence,[8] so that proof of no intent to defraud is not a good defence, not being equivalent to "acting innocently." [9] Using bottles stamped with the name of rival manufacturers, knowing that there was no authority to use them, is incompatible with innocence.[10] It has been held, however, that a person who had reason to suspect the genuineness of a trade mark might in special circumstances exonerate himself as having innocently sold the goods to which the trade mark was applied.[11] Proof merely that a servant, in conducting a sale of stockings as silk, which were not silk, had acted in perfect good faith and had not been guilty of fraud, is not proof of "acting innocently" in a charge against the master.[1] A master is liable for acts done by his servants acting within the general scope of their employment, although contrary to his orders, unless he can shew that he has acted in good faith and has done everything possible to prevent the commission of offences by his servants.[2]

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[1] 1887 Act, s. 18; *Gridley* v. *Swinborne*, 1888, 5 T.L.R. 71.

[2] As in paras. 1376, 1377, and 1378, *supra*.

[3] As in paras. 1374, 1375, 1376, and 1377, *supra*.

[4] 1887 Act, s. 2 (1).

[5] *Starey* v. *Chilworth Gunpowder Co.*, 1889, 24 Q.B.D. 90.

[6] As in para. 1378, *supra*.

[7] 1887 Act, s. 2 (2).

[8] *Coppin* v. *Moore* (No. 2), [1900] 2 Q.B. 306; *Allard* v. *Selfridge & Co.*, [1925] 1 K.B. 129.

[9] *Wood* v. *Burgess*, 1889, 24 Q.B.D. 162.

[10] *Wood* v. *Burgess*, *supra*; *Jenkinson* v. *Neilson Bros.*, and *Haddow* v. *Neilson Bros.*, 1899, 3 Adam 88 and 104.

[11] *Christie, Manson & Woods* v. *Cooper*, [1900] 2 Q.B. 522; but see *Allard* v. *Selfridge & Co.*, [1925] 1 K.B. 129.

(iv) *Employed in Ordinary Course of Business and took Reasonable Precautions.*[3]

1384. Charged with making dies, etc., or falsely applying a trade mark, or applying a false trade description or causing any of these things to be done,[4] an accused may exonerate himself by proving that he is employed by other persons in the ordinary course of his business to do work of the kind, and, having no interest by way of profit or commission on sale, was so employed by some person resident in the United Kingdom in the particular case, and, having taken all reasonable precautions, had no reason to suspect the genuineness of the trade mark, mark, or trade description, and has given to the prosecutor all the information in his power as to the persons on whose behalf it was applied. The accused, however, will be liable for the expenses of the prosecution, unless he has given notice that he intends to rely upon this defence.

(v) *Servant under Instructions of Master.*[5]

1385. Charged with any of the offences under the Act, an accused may exonerate himself by proving that he was the servant of a master resident in the United Kingdom, and *bona fide* was acting in obedience to the master's instructions, and, on demand, has given full information as to his master.

(vi) *Special Defence under Wine Acts.*[6]

1386. Under both of the Acts of 1914 and 1916 it is a good defence to proceedings under the Act of 1887 if it is proved that the wine to which the description is applied is intended solely for exportation from the United Kingdom.[7]

SUBSECTION (5).—*Special Application of Act to Watches.*

(i) *Marks on Watch Cases deemed Marks of Origin of Watch.*[8]

1387. When a watch case has thereon any words or marks which constitute, or are by common repute considered to constitute, a description of the country in which the watch (*i.e.* that portion which is not the watch case) was made, and the watch bears no such description, those words or marks are *prima facie* deemed to be such description, and the provisions of the Act regarding goods to which a false trade description[1] has been applied, and regarding selling, or exposing or keeping for sale or any purpose of trade or manufacture, goods with a false trade description, apply accordingly.

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[1] *Allard* v. *Selfridge & Co.*, [1925] 1 K.B. 129.

[2] *Coppin* v. *Moore* (No. 2), [1900] 2 Q.B. 306.

[3] 1887 Act, s. 6.

[4] As in paras. 1374, 1375, 1376, and 1377, *supra.*

[5] 1887 Act, s. 19 (3).

[6] Anglo-Portuguese Commercial Treaty Acts, 1914 and 1916; see para. 1372, *supra*, *voce* "false trade description."

[7] Sec. 1, proviso, in each Act.

[8] 1887 Act, s. 7.

(ii) *Watch Cases for Assay—Declaration of Origin required.*[2]

1388. Every person who after the date fixed by Order in Council[3] sends or brings a watch case, whether imported or not, to any assay office in the United Kingdom to be assayed, stamped, or marked, must declare in what country or place the case was made, before an assay officer, a justice of peace, or a commissioner for oaths, in prescribed form. Conviction of a false declaration involves, on indictment, the penalties of perjury, and on summary conviction, a maximum fine of £20. The assay office marks a watch made out of the United Kingdom differently from one made within, as prescribed by Order in Council.[4]

Subsection (6).—*Legal Proceedings.*

(i) *Jurisdiction and Procedure.*

1389. All prosecutions come before the Sheriff,[5] and, except where indictment is competent, are conducted under the Summary Jurisdiction (Scotland) Act, 1908,[6] upon a summary complaint. Indictment is only competent at the instance of a public prosecutor, the proceedings being in the Sheriff Court,[7] and the proviso in s. 2 (6) of the Act that a person charged on a summary complaint "shall on appealing (query—'appearing') before the Court and before the charge is gone into, be informed of his right to be tried on indictment," is of doubtful application in Scotland.[8]

(ii) *Saving of Civil Rights.*

1390. The Act does not exempt any person from any action, suit, or other proceeding which may be brought against him.[9] Nor does it entitle him to refuse to make a complete discovery or to answer any question or interrogatory in any action, but such discovery or answer is not admissible in evidence against him in a prosecution under the Act.[10]

(iii) *Prosecutors.*

1391. The Procurator-Fiscal is the usual prosecutor. A private person or company having an interest may also prosecute, with the concurrence of the Procurator-Fiscal,[1] but not upon indictment.[2] Power is given to the Board of Trade, if the general interests of the country, a section of the community, or a trade are affected, to prosecute offences,[3] except in cases relating to agricultural, horticultural, or fishing produce, in which case the Department of Agriculture for Scotland is the prosecutor.[4] Regulations have been made as to the undertaking of prosecutions by these bodies.[5]

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[1] Para. 1372, *supra*.

[2] 1887 Act, s. 8.

[3] Order in Council, 28th November 1887, repealed by Order in Council, *infra*.

[4] Order in Council, 7th May 1907 (S.R. & O. 1907 (No. 384), p. 665).

[5] 1887 Act, s. 21.

[6] *Ibid.*; 8 Edw. VII. c. 65; Renton and Brown, Criminal Procedure (2nd ed. by G. R. Thomson).

[7] Mackenzie, Criminal Law, Part ii. tit. 19, s. 1; *Dunbar* v. *Johnston*, 1904, 4 Adam 505.

[8] *Dunbar* v. *Johnston*, *supra*.

[9] 1887 Act, s. 19 (1).

[10] *Ibid.*, s. 19 (2).

(iv) *Complaint, etc.*

1392. It is sufficient, without further description and without any copy or facsimile, to state that a trade mark or forged trade mark is such.[6] When the owner of any goods or things cannot be found, a complaint may be brought to enforce a forfeiture only, and the Court, after advertisement, may order the forfeiture.[7] No prosecution may be brought after three years from the commission of the offence, or one year from its discovery by the prosecutor, whichever date is first.[8]

(v) *Appeals.*[9]

1393. As the normal procedure will be under the Summary Jurisdiction Act, 1908, so the normal form of appeal will be by stated case to the High Court of Justiciary. Notwithstanding s. 2 (5) of the Merchandise Marks Act, there is no appeal to a Court of Quarter Sessions.[10] Other methods of appeal which may be invoked in certain circumstances are: (*a*) advocation; (*b*) appeal under the Heritable Jurisdictions (Scotland) Act, 1746; (*c*) in solemn procedure only, appeal under the Criminal Appeal (Scotland) Act, 1926; and (*d*) in summary procedure only, suspension.

(vi) *Search Warrants, Forfeitures, etc.*

1394. Provision is made for obtaining and executing search warrants, and for bringing goods seized before the Court for determination as to forfeiture or otherwise.[11] When goods are forfeited the Court may order destruction, or disposal after all trade marks and trade descriptions have been obliterated, and may out of the proceeds of realisation award to any innocent party any loss he may have innocently sustained.[12]

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[1] Summary Jurisdiction Act, 1908, s. 18.

[2] See para. 1389, *supra*.

[3] Merchandise Marks Act, 1891 (54 & 55 Vict. c. 15), s. 2.

[4] Merchandise Marks (Prosecutions) Act, 1894 (57 & 58 Vict. c. 19), s. 1; Board of Agriculture and Fisheries Act, 1903 (3 Edw. VII. c. 31), s. 1 (8); Small Landholders (Scotland) Act, 1911 (1 & 2 Geo. V. c. 49), s. 4 (11), Schedule I.

[5] S.R. & O. Rev. 1904, VIII. Merchandise Marks, p. 13; S.R. & O. 1914 (No. 595), I. p. 773.

[6] 1887 Act, s. 9.

[7] *Ibid.*, s. 12 (2).

[8] *Ibid.*, s. 15.

[9] See Appeal (Criminal), Vol. I. p. 420, *ante*.

[10] *Turnbull* v. *H.M. Advocate*, 1908, 5 Adam 498.

[11] 1887 Act, s. 12 (1).

[12] *Ibid.*, s. 12 (3).

(vii) *Expenses.*

1395. In any prosecution expenses may be awarded against the prosecutor or against the accused, according to their conduct.[1]

SUBSECTION (7).—*Prohibition of Importation of Goods Liable to Forfeiture.*[2]

1396. Goods which if sold would be liable to forfeiture under the Act, and all goods of foreign manufacture bearing any name or trade mark being or purporting to be the name or trade mark of any manufacturer, dealer, or trader in the United Kingdom, unless the name or mark is accompanied by a definite indication of the country of origin, are prohibited from import and are to be included in the Customs list of prohibited goods.[3] Where, upon representations made to them, the Customs Commissioners are satisfied that the use of a home manufacturer's name or trade mark upon such goods is fraudulent, the proper officer may require the importer or his agent to produce documents relating to the goods and give information as to the consignor and consignee. Failure to comply within fourteen days involves a maximum fine of £100 for each offence. Information so acquired may be communicated to the person whose name or mark is alleged to have been used or infringed.[4] The Customs Commissioners have made regulations under the Act [5] regarding the detention and forfeiture of prohibited goods, and before detaining goods or proceeding towards forfeiture they may require the procedure enjoined by the regulations to be complied with, so as to satisfy themselves that the goods are prohibited goods.[6] A name on goods identical with or a colourable imitation of a place name in the United Kingdom, is deemed to be the latter, unless accompanied by the name of the actual country where such place is.[7] Evidence of the port of shipment is *prima facie* evidence of the place or country of manufacture.[8]

SUBSECTION (8).—*Miscellaneous Provisions and Restrictions.*

(i) *Implied Warranty on Sale of Marked Goods.*[9]

1397. On the sale or contract for sale of any goods to which a trade mark, mark, or trade description has been applied, the vendor is deemed to warrant the marks as genuine, not forged or falsely applied, and the description as not being a "false trade description," unless the contrary is stated in a signed writing delivered to and accepted at the time by the purchaser.

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[1] 1887 Act, s. 14.

[2] *Ibid.*, s. 16, as amended by the Merchandise Marks Act, 1911 (1 & 2 Geo. V. c. 31).

[3] See Customs (Consolidation) Act, 1876 (39 & 40 Vict. c. 36), s. 42.

[4] 1911 Act, s. 1.

[5] 1887 Act, s. 16 (3).

[6] *Ibid.*, s. 16 (2); S.R. & O. Rev. 1904, VIII. Merchandise Marks, p. 1; S.R. & O. 1905 (No. 519), I. p. 207.

[7] 1887 Act, s. 16 (4).

[8] *Ibid.*, s. 10 (2).

[9] *Ibid.*, s. 17.

(ii) *Prohibition of Use of Geneva Red Cross for Trade Purposes.*[1]

1398. Using for trade or business or any other purpose, without the authority of the Army Council, the emblem of the Geneva Red Cross, or the words "Red Cross" or "Geneva Cross," is an offence involving a maximum fine, on summary conviction, of £10 with forfeiture of the goods relating to which the contravention occurs. Without prejudice to the liability of a company or society, any of its officers, if knowingly a party to the contravention, is also liable.

(iii) *Restriction on Trade Use of Word "Anzac."*[2]

1399. Using in connection with any trade, business, calling, or profession the word "Anzac," without the authority of a Secretary of State given on request of the Australian or New Zealand Government, and whether or not the word has been registered before the Act as part of a trade mark, or name of a company, society, or body, is an offence involving, on summary conviction, a maximum fine of £10, or, for second or subsequent offences, £100. Without prejudice to the liability of a company or society which is guilty, any of its officers, if knowingly a party to the contravention, is also liable.

SECTION 3.—INDICATION OF ORIGIN.

SUBSECTION (1).—*Introductory.*

(i) *Purposes of* 1926 *Act.*

1400. The Merchandise Marks Act, 1926,[3] which is to be read as one with the previous Merchandise Marks Acts, in the interests of British production, (*a*) prohibits the sale of imported goods bearing the name or trade mark of a British manufacturer, unless they are accompanied by an indication of origin; and (*b*) applies the same prohibition to imported goods which are made the subject of an Order in Council, pronounced upon a report by a statutory committee, after inquiry made at the instance of a Government Department.

(ii) *General Definitions.*

1401. "Sale"[4] does not include a sale for consignment by the vendor to a person outside the United Kingdom, nor a sale of second-hand goods; but, with certain exceptions,[5] includes sale wholesale and retail. It does not include the sale of foodstuffs at hotels, etc., for consumption there, or of goods cooked or preserved in the United Kingdom. "Imported goods"[6] does not include those which, after importation, have undergone treatment in the United Kingdom resulting in a substantial change, or goods produced here and reimported whether or not they have undergone treatment abroad resulting in a substantial change. Imported goods are deemed to have been manufactured in the country where they last underwent treatment resulting in a substantial change.[1] "Indication of origin"[2] means, at the option of the person applying it, either (*a*) in the case of goods produced in a foreign country, the word "foreign," or in the case of goods produced in His Majesty's dominions (including protectorates, and mandated territories if so included by Order in Council[3]) outside of the United Kingdom (*i.e.* Great Britain and Northern Ireland) the word "Empire"; or (*b*) a definite indication of the country in which the goods were produced. The indication must always be conspicuous. In the case of British-produced goods substantially changed by treatment in a particular country, the indication may be given by using with the word "foreign" or the word "Empire" either words descriptive of the treatment or a definite indication that the treatment was undergone in the particular country, at the option of the person applying the indication. "Apply" has the same meaning as in s. 5 of the principal Act.[4]

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[1] Geneva Convention Act, 1911 (1 & 2 Geo. V. c. 20), s. 1.

[2] The "Anzac" (Restriction on Trade Use of Word) Act, 1916 (6 & 7 Geo. V. c. 51), s. 1.

[3] 16 & 17 Geo. V. c. 53.

[4] 1926 Act, s. 10 (4).

[5] *Ibid.*, s. 10 (4) (*b*).

[6] *Ibid.*, s. 10 (1).

SUBSECTION (2).—*Imported Goods bearing Name or Trade Mark of British Manufacturer.*

(i) *Indication of Origin required.*[5]

1402. It is unlawful to sell, expose for sale, or, by way of advertising other goods, to distribute, in the United Kingdom, any imported goods to which there is applied any name or trade mark being, or purporting to be, that of any manufacturer, dealer, or trader, or the name of any place or district, in the United Kingdom, unless accompanied by an indication of origin. "Application" may be either to the goods themselves or to any covering, label, reel, or other thing in or with which the goods are sold or exposed for sale. "Trade mark" in this connection means a mark on or with goods used to indicate that they are the goods of the proprietor of the mark by virtue of manufacture, selection, certification, dealing with, or offering for sale. Blends or mixtures (not including the product of a process of manufacture from materials of different kinds) are excepted.[6]

(ii) *Exemptions.*

1403. If, upon representations by persons substantially interested, the Board of Trade are satisfied that the circumstances of a trade are special, and that difficulties would arise through the application of the above provisions to goods of any class or description or sold under any particular designation, and that public interests would not be prejudiced by exemption, they may direct exemption to be published in the official *Gazettes*.[1] Nor will the above provisions apply to the application of a name or trade mark to coverings, labels, reels, etc., with the consent of the manufacturer, trader, or dealer whose name or mark it is.[2]

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[1] 1926 Act, s. 10 (3).

[2] *Ibid.*, s. 10 (1).

[3] See S.R. & O. 1928 (No. 249), p. 871.

[4] 1887 Act; see para. 1375, *supra*.

[5] 1926 Act, s. 1 (1) and (2).

[6] *Ibid.*, s. 10 (2).

SUBSECTION (3).—*Imported Goods scheduled by Order in Council.*

(i) *Prohibition of Sale, etc., of Goods without Indication of Origin required by Order.*

1404. Where, on reference from the appropriate department, a statutory committee has held an inquiry in relation to goods of any class or description, and the department has considered the committee's report, the department may, unless where it considers that prejudice to British or Empire trade would result, apply for an Order in Council under the Act prohibiting the sale or exposure for sale in the United Kingdom of imported goods of that class or description not bearing an indication of origin.[3]

(ii) *Prohibition of Importation of Goods without Indication of Origin required by Order.*[4]

1405. After the same procedure, Orders in Council may also be made requiring any imported goods to bear an indication of origin at the time of importation, and if such goods do not then bear such an indication, they are deemed prohibited goods under s. 16 of the principal Act.[5] But such an Order does not apply to goods *bona fide* imported merely for re-export.[6]

(iii) *Reference to Committee by Department.*

1406. Before a reference can be made there must first be made to the appropriate department an application which, in its opinion, substantially represents the interests of either manufacturers, producers, dealers, traders, users, or consumers, or of any body of wage-earners.[7] When a reference is made, it must be published in the *Gazettes* twenty-eight days before the inquiry begins.[8] The "appropriate department" [9] is the Board of Trade, except in relation to agricultural and horticultural produce, and the produce of the fishing industry, where the Minister of Agriculture and Fisheries, the Home Secretary and the Secretary of State for Scotland, act jointly. Such produce includes all foodstuffs except such as the Board of Trade, with concurrence of the Minister of Agriculture and Fisheries, declare to be excluded.[10] The Board of

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[1] 1926 Act, s. 1 (3); Petroleum, etc., S.R. & O. 1927 (No. 432), p. 774; Uncompounded Drugs, *ibid.*, p. 775; Farm and Garden Seeds, *ibid.*, p. 776.

[2] *Ibid.*, s. 1 (4).

[3] *Ibid.*, s. 2 (1); for Orders see para. 1408, *infra*.

[4] *Ibid.*, s. 2 (5).

[5] 1887 Act; see para. 1396, *supra*.

[6] 1926 Act, s. 2 (5), proviso (*a*).

[7] *Ibid.*, s. 2 (3).

[8] *Ibid.*, s. 2 (4).

[9] *Ibid.*, s. 10 (1).

[10] Declaration (Edible Gelatine), S.R. & O. 1927 (No. 1147), p. 777; Declaration (Tea), S.R. & O. 1928 (No. 621), p. 872.

Trade may act by its president, secretary, assistant-secretary, or by a person authorised by the president.[1]

(iv) *Committee—Procedure and Report.*

1407. There are to be two or more standing committees, of which at least one will deal with inquiries relating to agricultural, etc., produce. Each committee is appointed by the appropriate department and consists of from three to five persons, two being a quorum. The names of persons appointed are to be published. Persons substantially interested (in the opinion of the department) as traders or dealers in goods of any particular class or description, or as manufacturers of such goods or goods of which such goods form part, or as producers of such goods, are disqualified. Members of committee may be paid.[2] Sittings for evidence are public, unless in the opinion of the committee the evidence relates to confidential matters.[3] After hearing the substantial interests affected, the committee reports to the appropriate department, specifying the classes or descriptions of imported goods, if any (being goods to which they think it is practically possible to apply an indication of origin effectively and without injury to the goods), which they think should be the subject of an Order in Council, and recommending the form and manner of application of an indication of origin to be adopted. Before proceedings are taken upon it, the report must be published, laid before each House of Parliament, and notified in the *Gazettes*.[4]

(v) *Orders in Council.*

1408. Orders in Council are to specify (*a*) the manner in which the indication of origin is to be applied to the goods; (*b*) the date on which the Order is to come into force; and (*c*) whether the goods are to bear the indication of origin at the time of importation or of exposure for sale wholesale.[5] The usual provisions as to laying a draft Order before Parliament, revocation, variation, etc., apply.[6] Such Orders do not extend to blends or mixtures containing the goods in question unless they so expressly provide, in which case they may prescribe a special form of indication of origin. "Blend or mixture" does not include the product of a process of manufacture from materials of different kinds.[7] Several Orders in Council have been made,[8] covering a large variety of goods, and more are under consideration.

(vi) *Provisional Exemptions by Department.*[9]

1409. Where the appropriate department is satisfied by any persons substantially interested that the application of the whole or part of an Order to any particular class or description of the goods covered by it has caused or is likely to cause injury or hardship to them, the department has power to direct that the Order, or part of it, shall either cease to apply to the goods, or only apply subject to modifications and conditions. This provisional exemption is to be notified in the *Gazettes*, and the question of amendment of the Order [1] to meet the circumstances is to be referred to one of the statutory committees. Any direction by the department may be withdrawn, and in any case will cease to have effect on an amending Order [1] coming into force, or twelve months from the date of the exemption, whichever is the earlier.

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[1] 1926 Act, s. 11.
[2] *Ibid.*, s. 4.
[3] *Ibid.*, s. 2 (2).
[4] *Ibid.*, s. 2 (6), (7).
[5] *Ibid.*, s. 2 (8).
[6] *Ibid.*, ss. 7, 13 (5).
[7] *Ibid.*, s. 10 (2).
[8] See S.R. & O. 1927, 1928, 1929, *voce* "Merchandise Marks."
[9] 1926 Act, s. 3.

SUBSECTION (4).—*Offences and Penalties.*

1410. The offences are thus generally classified: (*a*) selling, exposing for sale, or distributing by way of advertisement, in contravention of the provisions of the Act; and (*b*) acting in contravention of, or failing to comply with, any Order in Council under the Act. These are treated as offences against the principal Act, with the substitution of the following penalties—on summary conviction a maximum fine of £5, and on second or subsequent offences forfeiture of the goods with a maximum fine of £20.[2]

1411. The following are exegetical of acts which may amount to offences: (1) advertising or offering for sale as goods of a particular brand or make or otherwise under a specific designation, whether by illustration or written matter, any imported goods the subject of an Order in Council, without including in the advertisement or offer an indication of origin, is deemed to be a contravention of an Order in Council, except where an advertisement has been made, issued, or published before the date of the Order; [3] (2) selling or exposing for sale any goods, of which imported goods subject to an Order in Council are a distinguishable part reasonably capable of having an indication of origin applied as required by the Order, is deemed to be selling or exposing for sale that part; [4] (3) selling or offering for sale in the United Kingdom, by sample, goods the subject of an Order in Council, unless the required indication of origin is applied to the samples, or particulars corresponding to the indication are communicated in writing to the receiver of the samples, is equivalent to a contravention of the Order; [5] (4) removing, altering, or obliterating an indication of origin, borne by goods in terms of an Order in Council at the time of their importation or exposure for sale wholesale, is a contravention of the Order, unless it is proved that there was no purpose of concealing the origin of the goods at the time of their sale or exposure for sale.[6]

SUBSECTION (5).—*Special Defences.*

1412. In a case of sale wholesale of any goods not required by Order to bear an indication of origin at the time of importation or exposure for sale wholesale, it is a good defence to satisfy the Court that the goods were sold to the purchaser on his written undertaking to export or sell them for exportation. Such written undertaking, if signed by the purchaser and specifying his usual business address, is admissible as evidence of the facts appearing therein.[1] If an accused proves that he took reasonable precautions against committing an offence, and that he had at the time no reason to suspect that the goods were goods subject to the Act or an Order in Council, and that on demand he gave the prosecutor all information in his power as to the persons from whom he got the goods, or otherwise that he acted innocently, he will be exonerated.[2] An employer or principal is entitled, on information duly laid, and on giving three days' notice to the prosecutor, to have the alleged actual offender brought before the Court at the hearing of the charge, and if after the offence is proved he satisfies the Court that he used due diligence to enforce compliance with the Act or Order, and that the alleged actual offender had committed the offence without his consent, connivance, or wilful default, then the actual offender will be convicted, and be liable to pay any costs in the discretion of the Court, and the employer or principal exonerated. In any such case the prosecution may cross-examine the employer or principal and any witnesses called by him, and may call rebutting evidence.[3]

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[1] One Order so amended; see S.R. & O. 1928 (No. 589), p. 854.

[2] 1926 Act, s. 5 (1).

[3] *Ibid.*, s. 5 (2).

[4] *Ibid.*, s. 5 (3).

[5] *Ibid.*, s. 5 (4).

[6] *Ibid.*, s. 8.

SUBSECTION (6).—*Execution of Act by Local Authorities.*

1413. Local authorities authorised to appoint an analyst under the Sale of Food and Drugs Acts may, in respect of any foodstuffs the subject of an Order in Council under the Act, execute the provisions of the Act except those relating to importation, and expenses so incurred by an authority are to be defrayed in the same manner as expenses under those Acts. Such local authorities' officers, duly authorised, have power to enter premises during business hours, and, on payment, to take samples of goods appearing to be imported foodstuffs subject to an Order in Council. Obstruction is a contravention of the Order. The officer taking a sample must notify the occupier or his agent that he is taking it under the Act, and must then, if required, select a second sample, or divide the first into two parts, and leave with him the second sample or the half sample.[4]

SECTION 4.—INDICATION OF QUALITY.[5]

SUBSECTION (1).—*Purposes of* 1928 *Act—Definitions.*[6]

1414. The Act is designed to further the improvement of British agricultural production, and to protect the consumer against inferior produce, whether British or foreign, by providing for the grading of agricultural produce under "grade designations" indicating a defined quality, and for the marking of articles for sale with a "grade designation mark." There are special provisions as to eggs. "Agricultural produce" includes horticultural produce. "Grade designation" means a grade designation prescribed by regulations made by the Department of Agriculture for Scotland.[1] "Covering" includes any vessel, box, crate, wrapper, tray, or other container. "Label" includes band or ticket. "Quality," in relation to any articles, includes their state and condition. "Registered premises" means premises for the time being registered as provided by the Act. "British eggs" means eggs of domestic fowls or domestic ducks produced in the United Kingdom. "Chemical storage" means storage for preserving eggs by any process which does not alter the composition of the shells, and includes storage in any gas, vapour, or gaseous mixture.

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[1] 1926 Act, s. 5 (1), proviso (ii).

[2] *Ibid.*, s. 5 (5).

[3] *Ibid.*, s. 6.

[4] *Ibid.*, s. 9.

[5] The Agricultural Produce (Grading and Marking) Act, 1928 (18 & 19 Geo. V. c. 19).

[6] 1928 Act, ss. 7, 9.

SUBSECTION (2).—*Grading of Agricultural Produce.*[2]

(i) *Regulations*[3] *prescribing Grade Designations and Marks.*

1415. The Department of Agriculture for Scotland[4] may by regulations prescribe appropriate grade designations indicating the quality of any articles of agricultural produce, the regulations containing a statutory definition of the quality indicated.[5] A "grade designation mark" may be prescribed by the regulations to represent the grade designation, and they may authorise, or empower anyone to authorise, the marking of articles, coverings, and labels accordingly.[6] The regulations are laid before Parliament when made, and may be annulled at the instance of either House within twenty-one days, without prejudice to the validity of anything already done thereunder, or to the making of new regulations. Regulations for Scotland have been made as undernoted,[7] and more are in contemplation.

(ii) "*Applying*" *Grade Designation.*

1416. A grade designation is applied to an article if used by or on behalf of the vendor, when the article is sold or delivered or exposed or offered for sale, so as to lead to the belief that the quality accords with the corresponding statutory definition of quality.[1] Where anyone sells an article with a grade designation applied, then, despite any contract or notice, it is deemed to be a term of the contract of sale that the quality accords with the statutory definition.[2]

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[1] 18 & 19 Geo. V. c. 34. Regulations are made for Scotland, and for England and Wales, separately.

[2] 1928 Act, ss. 1, 2.

[3] These are found in S.R. & O. under title, "Agricultural Produce (Grading and Marking)," not under "Merchandise Marks."

[4] For England and Wales, the Minister of Agriculture and Fisheries.

[5] 1928 Act, s. 1 (1).

[6] *Ibid.*, s. 2 (1).

[7] Beef killed in Scotland, S.R. & O. 1929 $\left(\text{No. }\frac{730}{\text{S. }56}\right)$; Eggs, *ibid.* $\left(\text{No. }\frac{13}{\text{S. }1}\right)$; Tomatoes, *ibid.* $\left(\text{No. }\frac{280}{\text{S. }15}\right)$.

(iii) "*Using*" *Grade Designation.*[3]

1417. A person selling, delivering, exposing, or offering for sale an article marked with a grade designation mark, or using any covering or label so marked, whether marked by him or some other person, uses, in connection with the article marked, or contained in the covering or attached to the label, the grade designation represented by the mark.

(iv) *Offences and Penalties.*

1418. Any person who (*a*) forges any grade designation mark; or (*b*) makes, disposes of, or has in his possession any die, block, machine, or other instrument for the purpose of forging a grade designation mark; or (*c*) uses in connection with any article any mark so nearly resembling a grade designation mark as to be calculated to deceive; unless he proves that he acted without intent to defraud, is liable, (1) on summary conviction, to imprisonment up to three months or a maximum fine of £20; or (2) on conviction on indictment, to imprisonment up to two years, or a fine, or both.[4] Marking an article, covering, or label with a grade designation mark without being authorised to do so by or under regulations, is an offence involving, on summary conviction, a maximum fine of £20.[5]

(v) *Enforcement by Local Authorities.*

1419. It is the duty of every county and town council to enforce the Act within the county or burgh, and for that purpose to appoint such officers as may be necessary, the expenses being defrayed out of such rate as they may appoint.[6] Where a notice is served under the Act on the occupier of registered premises,[7] a copy is to be sent to the council concerned.[8]

SUBSECTION (3).—*Special Provisions as to Eggs.*

(i) *Prohibition of Selling, etc., Preserved Eggs Unmarked.*[9]

1420. It is unlawful to sell or expose for sale any egg[10] which has been subjected to any process of preservation unless the egg is marked in the prescribed manner. Contravention involves, on summary conviction, for a first offence a maximum fine of £5, for a second or subsequent offence, £20. But the department is to exempt from the operation of this section, by order, eggs preserved by any process as to which it is satisfied that marking cannot be enforced.

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[1] 1928 Act, s. 1 (3).
[2] *Ibid.*, s. 1 (2).
[3] *Ibid.*, s. 2 (2).
[4] *Ibid.*, s. 2 (3).
[5] *Ibid.*, s. 2 (4).
[6] *Ibid.*, s. 5.
[7] See para. 1421, *infra*.
[8] 1928 Act, s. 6 (3).
[9] *Ibid.*, s. 3.
[10] See definition, para. 1414, *supra*.

(ii) *Registration and Use of Premises for Cold and Chemical Storage of Eggs.*

1421. Premises used or intended to be used by way of trade or for purposes of gain for cold or chemical storage [1] may be registered in a register kept by the county or town council in accordance with the department's regulations.[2]

(iii) *Offences connected with Storage of Eggs.*

1422. The following provisions are in force so long as an Order in Council under s. 2 of the Merchandise Marks Act, 1926,[3] is in force prohibiting the sale or exposure for sale in the United Kingdom of imported eggs not bearing an indication of origin: (*a*) using premises by way of trade, etc., for cold or chemical storage, unless registered, is an offence; (*b*) it is unlawful to cause British eggs, kept in cold or chemical storage in trade premises, to be removed therefrom unless marked in the prescribed manner, and the department may, by notice in writing served upon the occupier of any registered premises, direct that such British eggs kept in any part of the premises are not to be removed from specified parts of the premises until they have been duly marked, and a copy of the notice is to be kept by the occupier conspicuously posted in such parts of the premises as the department may direct, contravention of this paragraph or of the directions being an offence; (*c*) an officer of a county or town council, authorised, and if required, on production of his authority, may at any time when the premises are open for business enter any premises in which he has reason to believe that eggs are kept in cold or chemical storage, and may search for and inspect eggs there, and may require any person found in or about the premises to give such information as may reasonably be demanded as to any name and address required; obstructing an authorised officer, or wilfully withholding information legally required, is an offence; (*d*) removing, altering, or obliterating any mark which, in compliance with the foregoing provisions of the section was borne by any egg when it was stored, or selling or exposing for sale any egg from which such a mark has been removed, or on which it has been altered or obliterated, is, unless the accused prove that he acted without intent to defraud, an offence, and in the case of a second or subsequent offence under this paragraph [1] the Court may, in addition to any other penalty, order the eggs in relation to which the offence has been committed to be forfeited; (*e*) the penalty for a first offence under this section is, on summary conviction, a maximum fine of £5 (second or subsequent offences, £20).[2]

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[1] See definition, para. 1414, *supra*.

[2] 1928 Act, s. 4 (1).

[3] See paras. 1403 to 1408, *supra*. Order is in force, S.R. & O. 1928 (No. 1052), p. 865.

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[1] *I.e.* para. (*d*).

[2] 1928 Act, s. 4 (2).

MERCHANT SHIPPING.

See SEAMEN; SHIP.

MESSENGERS-AT-ARMS.

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SECTION 1.—ORIGIN AND HISTORY.

1423. The office of messenger, or "King's Officer," seems peculiar to Scotland, and is, not improbably, of Celtic origin. His privileges and duties bear a significant resemblance to those of the Eachlach.[1] Messengers-at-arms now form, along with the senior degrees of heralds, pursuivants, and macers, the corps known as His Majesty's Officers-of-Arms. Heralds and pursuivants are competent to act as messengers-at-arms. The only distinction in their service of writs which appears to have obtained was that execution by heralds or pursuivants was made upon persons of power or importance, who might not have hesitated to deforce a messenger, yet feared to incur the penalties of treason from deforcing a herald or pursuivant with coat-of-arms displayed. The messenger, being a man of small substance, required a cautioner, whereas the heralds and pursuivants, "Beirers of the greit armis" (*i.e.* the tabard, as opposed to the messengers' blazon), were admitted without caution, had to subscribe additional oaths, and enjoyed many other privileges not shared by messengers. All, however, now take the same oath and subscribe the same roll in Lyon Office. The services of a messenger are immediately obtainable, but those of a herald or pursuivant require application to the Lord Lyon, who, if he considers the case suitable, grants warrant to a specific officer.[2]

1424. In ancient times, the chief executive officer for writs issuing from the Supreme Courts of Justice was the Sheriff, who had at his disposal officers named sergeants, or mairs. In England the Sheriff is still bound to execute all processes from the King's Courts. The office of Sheriff was introduced to Scotland from foreign sources,[3] and required

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GENERAL NOTE.—The references to Scots Acts are to the folio edition.

[1] P. W. Joyce, LL.D., Social Life in Ancient Ireland, p. 135.

[2] Warrant to Sir Jerome Spence, Rothesay Herald, 1668, E. Dunbar, Documents relating to the Province of Moray, p. 136.

[3] W. C. Dickinson, Sheriff Court Book of Fife.

to adjust itself to previously existing systems. It appears that the mairs, serjeants, toschachdorachs, or King's officers, were part of an earlier administrative system, and only gradually fell under the Sheriff's control.[1] The statute establishing the Court of Session [2] ordains that its decrees be executed "be the Shiriff of the shires or his depute, or else be heralds, pursuivants, or macers," whilst three years later the "mairs and officiers who shall execute the King's letters and charges, as also Officiers of the King's," are all required to have signets.[3] "Officiers of the King's," as mair or King's serjeant, are already mentioned as existing in 1432,[4] and although still merely "officiars" in 1487, when complaints against them were to be raised before the Lords,[5] before 7th October 1510 they became messengers-of-arms, bearing the King's blazon and under the exclusive control of the Lyon.[6] They appear on the statute-book as "Officiers of Arms," and "persons weirand and beirand our Sovereign Lord's armis" in 1587,[7] whilst in the Middle Ages, when Sheriffs and other officers with local connections were frequently untrustworthy, heralds or messengers were in use to be appointed "Sheriffs in that part" for the execution of letters under the Signet. It was probably considered in the mutual interests of the Crown and of the lieges that the messengers should be appointed and controlled by an independent officer such as the Lord Lyon, and not subject to the patronage of the Lords or Sheriffs. One of our earliest authorities expressly states that the Sheriff employs "any of the King's officers," [8] and when various coloured wands were assigned to the officers of Royalty, Regality, Barony, and Burghs, there is no distinction between those of the King's officers whether appointed by the Lyon or the Sheriff.[9]

1425. Between 1587 and 1672 sundry statutes were passed for regulating the numbers and behaviour of these officers, who in the Middle Ages appear to have become over-numerous and ill-controlled. Nowadays a different state of affairs has supervened, as, owing to the alterations introduced by the Citation Act of 1882,[10] the business of a messenger-at-arms has become so restricted as to be hardly profitable. In a case occurring in 1912 the Court pointed out there were only thirty-two messengers-at-arms in Scotland, fifteen of these being in Edinburgh or Glasgow.[11] Fortunately it is now being appreciated that this ancient and distinguished office, and the right to wear its ancient insignia, is a privileged and historical appointment; the numbers and standing of messengers-at-arms are now increasing, and the difficulties of readily obtaining their services, apprehended at the close of last century, are soon unlikely to be a matter of concern to the lieges. The archaic provisions regarding cautioners have been the principal cause of difficulty in securing messengers, and these provisions now serve no useful purpose. Many sheriff officers are now also messengers-at-arms.

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[1] Bankton, ii. 503 ; Dickinson, Sheriff Court Book of Fife, lxxii.

[2] 1532, c. 2, Acts, ii. 338.

[3] 1540, c. 9, Acts, iii. 359.

[4] 1432, c. 10, Acts, ii. 22.

[5] 1487, c. 10, Acts, ii. 177.

[6] *Cowpar*, 1510, Pitcairn's Criminal Trials, i. *63.

[7] 1587, c. 30; 1592, c. 29.

[8] Balfour, Practicks, 274, s. xiii.

[9] 1432, c. 11, Acts, ii. 22.

[10] 45 & 46 Vict. c. 77.

[11] *Whyte, Ridsdale & Co.*, 1912, 2 S.L.T. 73.

Section 2.—Insignia.

1426. In the early fifteenth century it was ordained that "Ilk officiar of the kingis, as mair or kingis sergeand," should bear a horn and a red baton at least two feet long.[1] These were the badges of his office, for in the execution of captions the messenger required to touch the party with his rod before reading to him the letters, and in the injunctions issued to messengers by Lord Lyon Brodie of Brodie it was enjoined "that a messenger execute no letters against any person without his blazon on his breast, blowing-horn, and wand tipped at the two ends with letters, one of his name and the other of his surname, to serve for a stamp to his executions, under the pain of deprivation." The baton, called of old "the wand of peace," from its use at relaxation of rebels at the horn, received into the King's peace, has now degenerated into an ebony rod some six inches long, tipped with silver at each end. To it is attached by a ring the blazon which, when a messenger is deforced, he moves from one end of the rod to the other. The horn was originally used to raise the country and assist the Sheriff in pursuit of fugitives,[2] and to call the attention of the lieges to what the messenger was about to do, though the horn itself, as well as the blowing thereof, has long since become a legal fiction. Heralds and pursuivants, unlike messengers, never themselves carry a horn or trumpet, but are accompanied by one of the State trumpeters who are attached to the Lyon Court and available when required. In the Middle Ages a trumpeter was known as a "trumpet," hence the popular misunderstanding regarding the phrase "Herald with Trumpet," which signifies two persons.

1427. The blazon, a piece of brass or silver having the impression of the King's arms upon it, was evidently added to the messengers' insignia to distinguish him from the serjeants of the regality, sheriffdom, or burgh, and presumably at the time when the messengers were first placed under the control of the Lyon Court between 1487 and 1510.[3] The brass blazons used in the sixteenth century were considered unsatisfactory, and the Act 1587, c. 30, ordains the messengers to have new blazons of silver, which the messengers are required to bear upon their breasts. No evidence survives of how the blazon (now ordinarily attached by its ring to the baton) was formerly affixed to the breast of the messenger; but the ring implies it would be hung about the messenger's neck by a cord, presumably of twisted red and yellow silk (Scots Royal livery), and it is considered by the present Lord Lyon that a messenger is entitled to wear his blazon in this form on all formal occasions.

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[1] 1432, c. 11, Acts, ii. 22.
[2] 1432, c. 10.
[3] Acts, ii. 177; Pitcairn's Criminal Trials, i. *63.

1428. It is essential that a messenger should display his blazon and wand so that he may be known to be a messenger, and when he charges, his blazon must be so displayed that the Royal arms are visible, for if any affront be done to him without his blazon displayed, it will not import deforcement, unless the actor knew him to be a messenger. In apprehensions where imprisonment for civil debt is still competent, both the blazon and the "wand of peace" are necessary, and to constitute "imprisonment" the messenger must touch the party to be taken with his rod and then read to him the letters of caption. If the messenger have witnesses or assistants sufficient to compel an unwilling captive to go to prison, the non-reading of the letters will not annul the caption, but, if the prisoner should escape, the reading of the letters or giving a copy thereof would not have the same effect as if the blazon were seen, or the party were touched with the rod, these being the undeniable evidences of the messenger's authority.[1] In the execution of letters of poinding it is also a sufficient defence that the messenger had not his blazon on.[2]

SECTION 3.—ADMISSION.

1429. The Lord Lyon King of Arms has alone the power of appointing messengers-at-arms,[3] though on certain occasions the Lords have been ordained to advise Lyon whom he should appoint or retain.[4] No apprenticeship or professional qualification is required, and the appointment of notaries public or sheriffs' officers to be messengers is very usual. The offices of messenger and procurator in the Sheriff Court cannot, however, be conjoined,[5] and a menial servant cannot be appointed a messenger.[6] Application for admission is made by petition to the Lord Lyon. A remit is made by the Lyon Clerk to the macer of the Lyon Court to examine the candidate as to his knowledge of the rules and business of a messenger. The Lyon macer makes a report, and, if the petitioner is found duly qualified and the caution is approved of, a bond of caution is drawn by the Lyon Clerk, and the Lord Lyon pronounces an interlocutor authorising the Lyon Clerk to issue an admission. From the earliest period, messengers, before admission, have been required to find caution for the exercise of their office.[7] The Lord Lyon, or in his absence the Lyon Clerk,[8] administers the oath of allegiance and *de fideli*; the messenger subscribes the roll and then receives his admission under the seal of the Lyon Court, and his blazon and wand.

1430. Any messenger has a title to object to the admission of a candidate, upon any relevant ground. The objection should be stated to the Lord Lyon before the candidate's admission. In *Drummond's* case

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[1] Stair, iv. 47, 14.

[2] Stair, *ibid.*; Ross, Lectures, i. 338; Bell, Com. ii. 436.

[3] 1587, c. 46; 1592, c. 125; *Lindsay* v. *Drummond*, 1744, Mor. 8889; C.A.S., A, ix. 9.

[4] 1587, c. 30, Acts, iii. 449.

[5] *Bowhill* v. *Sheriff of Berwickshire*, 1825, 4 S. 61.

[6] C.A.S., A, ix. 6.

[7] 1587, c. 30 and c. 73, Acts, iii. 457.

[8] 30 & 31 Vict. c. 17, s. 2.

Lord Elchies suggested that, should the Lord Lyon appoint as messenger a person infamous by public sentence or otherwise incapable, a suspension of the appointment might be competent in the Court of Session,[1] but the majority of the Court held that any objection should be taken in Lyon Court, and the Lord Lyon's judgment brought under review if so desired. Lyon having made the appointment, to him supplication must be made for its recall.

1431. Dues on admission, amounting in all to about £22, are payable on the admission of a messenger,[2] and twenty days before the 6th of May in each year every messenger must intimate to the Lyon Clerk a declaration as to whether his cautioners are dead or alive, and their present address.[3] He must also intimate his own place of residence and any intended change.[4] Upon the death or bankruptcy of any cautioner, the messenger must—upon pain of suspension—find a new cautioner within twenty or fifty days, according to his place of residence.[5] Annual dues of about 17s. 6d. are also payable, so long as messengers are in office,[6] and they are to receive a copy of the Regulations for messengers.[7] The former allocation of messengers to specific counties and subsisting admission "to practice within" and "without" the county of Edinburgh refers solely to allocation and admissibility of travelling expenses.

SECTION 4.—DUTIES.

1432. Messengers-at-arms are the King's officers required to execute all writs proceeding from the Supreme Courts of Scotland—viz. the Court of Session and the High Court of Justiciary. Summonses and other writs under the Signet are addressed to them, and except in special circumstances can be executed by them alone. Under the Court of Session Act, 1868,[8] service of summonses and citation of witnesses might be made by sheriff officers in districts where no messenger-at-arms resides,[9] but no fresh provision is made for the execution of diligence or warrants issuing from the Court of Session, and these can still be carried out only by a messenger-at-arms;[10] thus, a charge upon an appeal protested and registered for execution in the Books of Council and Session cannot competently be given by a sheriff officer.[11] The Court of Session has on several occasions, in the exercise of its *nobile officium*,[12] authorised sheriff-officers to act as messengers-at-arms, or as Sheriffs in that part,[13] in a county or district where there was no messenger-at-arms to execute diligence to follow upon a decree of the Court of Session,[14] and the

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[1] *Lindsay* v. *Drummond*, 1744, Mor. 8889.
[2] 30 & 31 Vict. c. 17, Schedule B.
[3] C.A.S., A, ix. 12.
[4] *Ibid.*, 1.
[5] *Ibid.*, 9.
[6] *Ibid.*, 13.
[7] *Ibid.*, 16.
[8] 31 & 32 Vict. c. 100, s. 19.
[9] *Robertson*, 1893, 20 R. 712; *North of Scotland Bank*, 1891, 18 R. 460; *Kennedy*, 1862, 24 D. 1131; *Schweitzer*, 1868, 7 M. 24.
[10] *Buchanan* v. *British Natural Premium Provident Association*, 1903, 11 S.L.T. 465.
[11] *Harper* v. *Inch and Riddell*, 1883, 20 S.L.R. 866.
[12] *Kennedy*, 1862, 24 D. 1131.
[13] *Cooper*, 1854, 16 D. 1104.
[14] *Mitchell*, 1764, Mor. 7355; *Whyte, Ridsdale & Co.*, 1912, 2 S.L.T. 73.

Execution of Diligence (Scotland) Act, 1926,[1] has given a Sheriff's officer many of the powers of a messenger-at-arms in any county where there is no resident messenger. Difficulties may arise in case of deforcement, for these officers have no authority to display the blazon, which on certain occasions it is essential for a messenger to do,[2] and Lyon alone has power to confer upon anyone this privilege of displaying the King's arms.[3]

1433. It has recently been questioned whether messengers can execute writs issuing from the Sheriff Courts,[4] the argument being that the messenger is not an "Officer of Court," nor his appointment the Sheriff's patronage. The argument seems constitutionally unsound, for both the Sheriff and the messenger are the King's officers, the Sheriff Court is the King's Baron Court,[5] and the King's officer, the messenger-at-arms, is obviously an appropriate executive officer in any of the King's Courts.[6] Employment of a messenger is frequently a matter of convenience, since his commission is available outwith the bounds of the sheriffdom, within which alone the commission of the Sheriff's mairs, or officers extends. The competency of the messenger-at-arms to execute Sheriff Court writs was, on appeal, sustained in the House of Lords,[7] affirming an interlocutor by the Sheriff of Inverness, finding a messenger-at-arms a "regular officer of Court."

1434. Every messenger is bound to serve any of the lieges in the way of his office, upon their reasonable expenses, and if he refuses, either from respect of persons or other frivolous excuses, he is answerable in a competent Court.[8] No sum other than the appropriate fees must be exacted,[9] and no messenger shall purchase goods sold under diligence,[10] nor must he pull down or deface any notice or copy of execution which he is required to affix.[11] Even commanders of Royal fortresses are bound to give access to messengers or other officers of arms to execute the King's letters.[12]

1435. Except in some cases of apprehension for commission of crimes,[13] an officer can do nothing without a legal written warrant, and he must act in strict conformity to it. The messenger, as such, has no discretionary power. If his instructions are direct or unambiguous, he is bound to follow them, but if they give a discretionary power, duly exercised by him, he is not liable.[14] It has been settled in many cases that the measure of damage to the employer is the full amount of the debt. It has, however, been pointed out that, since diligence is against the property and not against the person, it would appear more reasonable that the measure of loss should be the amount actually recoverable.

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[1] 16 & 17 George V. c. 16.

[2] Stair, iv. 47, 14; Ross, Lectures, i. 338; Bell, Com. ii. 336.

[3] *Liber Curiarum et Processus Dni Roberti Forman de Luthrie, Militis, Leonis Regis Armorum*, fol. 18, Register House; 1587, c. 46; 1592, c. 125; *Lindsay* v. *Drummond*, 1744, Mor. 8889; *Macdonnell* v. *Macdonald*, 1826, 4 S. 371.

[4] Wilson, Sheriff Court Practice, p. 45; *Hamilton* v. *Bain*, 1861, 3 S.L.J. 29.

[5] W. C. Dickinson, The Sheriff Court Book of Fife, xxvi.

[6] Balfour, Practicks, 274, s. xiii.

[7] *Finlayson* v. *Innes*, 1802, 1 Pat. 443.

[8] C.A.S., A, ix. 2.

[9] *Ibid.*, 4.

[10] *Ibid.*, 5.

[11] *Ibid.*, 7.

[12] *Belshes* v. *Coran and Kinloch*, 1751, Mor. 8890.

[13] Darling on Messengers-at-Arms, pp. 16–184.

[14] *Cullen* v. *Smith*, 1847, 9 D. 606.

SECTION 5.—LIABILITY OF MESSENGERS AND CAUTIONERS.

1436. A messenger, in undertaking his office, becomes bound, as it were by special contract, to discharge its duties in any way, or against whomsoever he may be employed to do so.[1] He must be able to apply the necessary skill under the ordinary rule of professional men.[2] The messenger's duty, however, is to execute the warrant placed in his hands, and the skill professed by him in legal matters is not supposed to extend beyond what is connected with that duty. Accordingly, if the warrant is *ex facie* good, he is not liable if it is illegal, or if it had been irregularly obtained.[3]

1437. It is incompetent for a messenger to execute diligence for his own behalf and that of another on a bill which he has indorsed.[4] Both the messenger and the cautioner are liable, not only to the employer, but to any person suffering damage through the negligence, or fraudful or informal execution of the messenger.[5] Where the messenger is liable in damages for negligence, he is liable in the full amount of the debt which is the object of the diligence,[6] but he would not be liable to pay the debt until it had been constituted against the debtor.[7] A messenger is not liable in damages for executing diligence for a sum larger than was actually due, unless he was cognisant, or ought to have been cognisant, of the charge.[8] A messenger is liable where, although the diligence is quite regular, he ought to know that he should not proceed with the execution of it.[9]

1438. The cautioner is liable only for what the messenger does, or neglects to do, in his proper office of messenger.[10] Thus a messenger occasionally acts as an agent, and the cautioner is not liable for his actings in that capacity.[11]

SECTION 6.—LIABILITY OF EMPLOYER.

1439. It has always been held that the employer, being a private party, of a messenger or sheriff officer, is liable for his actings in executing the diligence,[1] but he will not be liable for an entirely unauthorised proceeding, such as execution of diligence a second time.[2] This liability of the employer has been questioned in later years,[3] but the decision in *Beattie* v. *Maclellan* [4] has never been overruled.

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[1] Per Lord Gillies in *Glen* v. *Black*, 1841, 4 D. 42.

[2] Bell, Com. ii. 489.

[3] *Scot* v. *Banks*, 1628, Mor. 1016.

[4] *Dalgliesh* v. *Scott*, 1822, S. 544.

[5] *M'Lellan*, 1766, 5 Bro. Supp. 920; *Classon* v. *Black*, 1842, 4 D. 743; *Glen* v. *Black*, *supra*; *Kennedy* v. *Mackinnon*, 1821, 1 S. 210; *Inch* v. *Thomson*, 1836, 14 S. 1129; *Struthers* v. *Dykes*, 1845, 7 D. 436; 1847, 9 D. 1437; 1850, 7 Bell's App. 390; *Beattie* v. *Maclellan*, 1846, 8 D. 930; *Petersen* v. *M'Lean*, 1868, 6 M. 218; *Gray* v. *Smart*, 1892, 19 R. 692.

[6] *Couper* v. *Bain*, 1868, 7 M. 102; *Monteith* v. *Hutton*, 1900, 8 S.L.T. 250.

[7] *Wright* v. *O'Henly*, 1827, 5 S. 311.

[8] *Henderson* v. *Robb*, 1871, 10 M. 104.

[9] *Stewart* v. *Macdonald*, 1784, Mor. 13989; *Pearson* v. *Anderson*, 1833, 11 S. 1008; *Ritchie* v. *Dunbar*, 1849, 11 D. 882; *Inglis* v. *Macintyre*, 1861, 23 D. 1240.

[10] Bell, Com. ii. 382.

[11] *Welsh* v. *M'Veaghs*, 1781, Mor. 8893; *Wilson & Co.*, 1817, F.C. 268.

SECTION 7.—LIABILITY OF LAW AGENT FOR MESSENGERS' FEES.

1440. It is the practice in Scotland that law agents are personally liable in the first instance for the fees of messengers-at-arms employed by them as such.[5] The messenger must not act as agent for the party at whose instance the diligence is executed, nor attempt to recover his fees and expenses from those against whom he does diligence.[6]

SECTION 8.—CONTROL OF MESSENGERS-AT-ARMS.

1441. Control of His Majesty's officers-of-arms has from the earliest period been within the jurisdiction of the Court of the Lord Lyon, which in this and heraldic matters has exercised a customary as well as a statutory jurisdiction. Originally His Majesty's officers-of-arms consisted of the heralds, pursuivants, and macers only. The "King's officers" as a body were not at first included nor authorised to bear the Royal arms, though they no doubt wore the Royal livery colours. By the Act 1487, c. 10,[7] complaints against defaulting officers were ordained to be heard before the Lords of Council, who were given powers of deprivation. But the statute seems to have been inoperative, or the Council to have been found an unsuitable body for controlling the officers, for within a few years they were given to bear the Royal arms, were included in the term "Officers-of-Arms," and placed under control of the Lord Lyon, apparently by Royal Commission in the Lyon's favour, as appears from the second commission to Sir Robert Forman of Luthrie,[8] though this may have been due to statutory provisions not now extant.[9] The Lyon Court had become the exclusive jurisdiction over messengers, prior to 7th October 1510.[10] In 1525 the Lord Treasurer was empowered to deprive officers-of-arms under the rank of herald, but only for the offence of refusing to "pass sic errands as he lays to their charge in the King's name," [11] whilst in 1532 the Lords of Council had, or claimed to have, jurisdiction in deprivation.[12] The dates and circumstances suggest a temporary political expedient during the reign of Lord Lyon Pettigrew of Magdaleneside, an adherent of the house of Douglas, and on the appointment of Sir David Lindsay of the Mount the Lyon Court resumed exclusive jurisdiction,[1] which as regards suspension and deprivation remained intact until the eighteenth century,[2] when the Court of Session claimed a concurrent jurisdiction in 1738. This decision was virtually reversed in 1744,[3] and not revived until the nineteenth century.[4]

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[1] *Beattie* v. *Maclellan*, 1846, 8 D. 930.

[2] *Stewart* v. *Macdonald*, 1784, Mor. 13989.

[3] *Lecomte* v. *Douglas*, 1880, 8 R. 175.

[4] 1846, 8 D. 930.

[5] Maclaren, Court of Session Practice, p. 1115.

[6] *M'Lachlan* v. *Black*, 1821, 1 S. 206; *Monro* v. *Ross*, 1738, Mor. 8889.

[7] Acts, ii. 177.

[8] 15th October 1561, Privy Seal.

[9] 1592, c. 125, refers to previous "Acts," of which none are now extant.

[10] *Cowpar*, 1510, Pitcairn's Criminal Trials, i. *63; *Crawar*, 1554, Spalding Club Miscellany, ii. 215; *Symsone* v. *Strang* (Haddington Burgh Court Books), 1554, Riddell MSS., vol. li., Signet Library.

[11] Acts, ii. 296.

[12] *Lords* v. *Andrew Murray*, 1532, Mor. 7319.

1442. Whilst the appointment of messengers rests exclusively with the Lord Lyon, their control has been the subject of a peculiar dual jurisdiction. The Lord Lyon is the competent and appropriate judge of deprivation and suspension of messengers and penalties in their bonds of caution. So early as 17th October 1510 the Lord Lyon—then Sir William Cumming of Inverallochy—had exclusive control of the messengers-at-arms, and the Lords of Council having found it established that a messenger, John Cowpar, had "faltit richt gretumlie" in the execution of his office, charged Lyon "that the King's arms be taken fra John Cowpar an he be deprivit." [5] On 18th May 1554 Ross Herald, as Lyon depute, repledges an action of theft against a messenger, on the ground that Lyon Court had exclusive jurisdiction.[6] Of the Lyon Court proceedings in the action of deprivation against William Crawar, messenger,[7] the original decree, subscribed by Sir David Lindsay of the Mount, is preserved in the Erroll charter chest,[8] and the extract, under the hand of Adam M'Culloch, Bute Pursuivant and Lyon Clerk, gives the additional particulars that the Earls of Angus and Erroll sat as the Lord Lyon's assessors (though the decree is by Lyon and his brother heralds alone), and that this ordained the messenger duly deprived, "to be delivered in my Lord Constable's hands to be puneist." [9] The second commission to Lord Lyon Sir Robert Forman of Luthrie, 31st October 1561,[10] shews that in the sixteenth century it was the practice for the Lord Lyon to transmit persons convicted in his Court to the Lord High Constable for punishment, "all civil magistrates" being required by the Act 1592, c. 125, to assist in the execution of Lyon Court judgment, evidently in consequence of the decay in the Constable's jurisdiction.[11] From Forman's commission it also appears that the Lord Lyon's control of messengers had existed for some considerable time, in virtue of several Crown grants to preceding Lyons. For this period the Court Book of Sir Robert Forman is extant, and a Royal letter of 28th February 1558 commands the Lyon to pronounce sentence of death and escheat of goods to the Treasury on all persons who "tak upon hand to bear" the Royal arms, or use the office of macer or messenger "without Lyon's written admission," all Sheriffs and their deputes, provosts and baillies of burghs being ordained to remit such offenders to Lyon Court "to be puneist as said is." [1]

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[1] *Symsone* v. *Strang*, Riddell MSS., vol. li., Signet Library; Forman's Commission, *supra*.

[2] *Monro* v. *Ross*, 1738, Mor. 8889.

[3] *Lindsay* v. *Drummond*, 1744, Mor. 8889.

[4] *Maclachlan* v. *Black*, 1821, 1 S. 206.

[5] Pitcairn's Criminal Trials, i. *63.

[6] *Symsone* v. *Strang*, *supra*.

[7] 16th January 1554–55.

[8] Spalding Club Miscellany, ii. 215.

[9] Nat. Lib. MSS. 34–6–24; Chalmers, Works of Sir David Lindsay, i. 39.

[10] Privy Seal.

[11] Acts, iii. 554.

1443. This Court Book contains the record of a number of cases, demonstrating that the Lyon Court had at this date a jurisdiction in debt [2] even against third parties, where the debtor was an officer-of-arms, as appears from the action by Thomas Auchinbathie, assignee of James, Archbishop of Glasgow, against William Scrymgeour, son to Master John Scrymgeour of the Myres.[3] Where necessary, Lyon grants warrant for officers-of-arms to poind,[4] whilst in 1578 the officers-of-arms protested that Lyon was their own proper judge,[5] which the Council again affirmed in the seventeenth century, remitting such cases back to the Lyon Court,[6] the term "remit," implying the handing over of the case to the competent legal tribunal.[7] The same jurisdiction and a caption following on a Lyon Court decree for debt are found after the Restoration.[8]

1444. In 1567 Parliament enacted that "good provision be made for reformation of ye Office of Arms, ye abuse whereof stands in ye imperfection of Lyoun Herauld," [9] and it has been lately suggested that this statute led to the Act 1587, c. 46, and was the foundation of the Lyon Court.[10] Forman was a Roman Catholic, the "imperfections" were religious and political, and within two months Forman's demission had been secured, the Court of Session arrogated to itself the control of the macers,[11] whilst the "reformation" of the whole corps of officers-of-arms was completed by Lord Lyon Sir David Lindsay of Rathillet before 26th April 1569.[12] The Act of 1587 is, however, the first extant legislation defining and regulating the customary jurisdiction of the Lyon Court. It settled the number of the officers-of-arms, and commissioners were appointed to consider the qualifications of those in office and report to the Lords of Council and Session, who are to recommend the Lyon which should continue in office, and who are to receive new appointments from him, and silver blazons. Lyon is bound to sit two courts, on 6th May and 6th November yearly, to which parties are to be summoned on fifteen days' induciæ by a precept containing the cause of the complaint relevantly libelled, and officers found culpable are not only to be deprived, but the cautioner is ordained to incur the penalty; the Acts and Decrees of Lyon Court are to be formally written and registered, whilst "siclike letters" as pass on the decrees of any other judge ordinary are ordained to pass upon Lyon decrees.[1] By the Act 1592, c. 29,[2] it is ordained that charges of treason shall be executed only by the ordinary heralds and pursuivants, with coats of arms displayed, or by macers; and that, since the abuses of messengers still continued, Lyon, with advice of the Lords of Council and Session, should enforce the statute of 1587, and command all civil magistrates, as they shall be required by the king-of-arms or his deputes, to concur with him in enforcing the Acts in favour of his office, and also to concur with him, under the penalty of horning, to the punishment and incarceration of those who usurp the Royal arms. Any Court is therefore competent to summarily punish a bogus messenger, which is a proceeding fundamentally different from suspension or deprivation of a genuine messenger.

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[1] *Liber Curiarum et Processus*, fol. 18, Register House.

[2] *Sawer* v. *Carrick*, 29th February 1557, *ibid.*, fol. 1; *Ross* v. *Harvey*, 5th July 1560, *ibid.*, fol. 6.

[3] *Auchinbathie* v. *Scrymgeour*, 31st January 1560–61, *ibid.*, fol. 7.

[4] *Sawer* v. *Carrick*, *supra*; *Dickson* v. *Lawson*, 22nd November 1560, *ibid.*

[5] Privy Council, 1st Series, iii. 24.

[6] 1617, *Williamson and Winrahame* v. *Lord Lyon*, Privy Council, 1st Series, ix. 103; *Drysdale* v. *Winrahame*, *ibid.*

[7] Riddell, Peerage Law, p. 39.

[8] *Stacey* v. *Telzefear*, 1669, King's and Nobility's Arms, ii. 54, Lyon Office.

[9] Acts, iii. 44.

[10] *Royal College of Surgeons* v. *Royal College of Physicians*, 1911 S.C. 1061.

[11] Account of the Office of Heraulds.

[12] Privy Council, 1st Series, 658, 660.

SECTION 9.—DEPRIVATION AND SUSPENSION.

1445. The Lord Lyon has been held to have unquestionably jurisdiction to suspend or deprive messengers for misconduct,[3] and when a messenger's cautioner dies or becomes bankrupt, and a new cautioner is not found, it is usual to suspend the messenger until new and sufficient caution be found.[4] From any order, interlocutor, or sentence of the Lyon Court there lies an appeal to the Court of Session.[5] A Lyon Court decree was found irregular and void, on account of irregularity in the proceedings in a Lyon Court held in 1766.[6] The present practice is, that when the Lord Lyon is of opinion that the conduct of a messenger warrants his suspension or deprivation, the Lyon Clerk sends notice to the messenger by registered letter that, unless he shews cause to the contrary within fourteen days, sentence of suspension or deprivation will be pronounced in Lyon Court. If the messenger intimates his desire to be heard he is cited to a diet in Lyon Court, and has reasonable opportunity of showing cause why he should not be suspended or deprived.[7] When sentence of suspension or deprivation is pronounced in Lyon Court, it is intimated on the walls of the Court of Session and in the Sheriff Court in the county where the messenger resides, after which the messenger so suspended or deprived shall not act as a messenger under a penalty of £10 for each transgression.[8]

1446. It is now known [9] that the Lyon Court was a pre-statutory tribunal, and exercised a jurisdiction in debt or damages in the sixteenth and seventeenth centuries. In 1666 this jurisdiction of the Lyon Court was sustained by the Court of Session,[1] but some of the judges considering it dangerous to allow the Lyon Court to have cognisance "throughout the whole kingdom" of civil rights "which may be of the greatest moment and intricacy" not directly connected with the Lord Lyon's office,[2] an opposite decision was arrived at in two other cases in dependence at the same time, on the ground that from the Court books, available and produced (1629–1666), no such jurisdiction appeared to have been exercised in Lyon Court except for small sums, and that the Lord Lyon's jurisdiction over messengers was "to punish for a crime, not to act as a civil judge between parties."[3] According to these decisions, the Lord Lyon in his jurisdiction over messengers is restricted to decerning against the messenger and his cautioners to the extent of the penalty contained in the bond of caution, and suspending or depriving messengers for acts of malversation.[4]

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[1] Acts, iii. 450.

[2] *Ibid.*, 554.

[3] *Crawar*, 1554, Spalding Club Miscellany, ii. 215; Act 1592, c. 29; Act 1669, c. 95; Act 1672, c. 47; Tenth Report of Commissioners of Scots Courts of Justice, p. 12; C.A.S., A, ix. 15; *Clyne* v. *Murray*, 1831, 9 S. 338.

[4] Darling, Messengers-at-Arms, p. 5.

[5] C.A.S., A, ix. 15; *Lindsay* v. *Drummond*, 1744, Mor. 8889; *Clyne* v. *Murray*, *supra*.

[6] *Lord Lyon* v. *Copeland and M'Coll*, 1766, Mor. 7652.

[7] C.A.S., A, ix. 10.

[8] *Ibid.*, 11.

[9] See para. 1441, *supra*.

1447. The Court of Session latterly claimed a concurrent jurisdiction with the Lyon Court, to entertain complaints against a messenger, and to suspend or deprive him of his office.[5] In 1738 this was commented upon as a departure from the accepted practice[6] to which the Court reverted in 1744,[7] and it has latterly been "considered to be safer" to remit to Lyon to suspend or deprive.[8] The Act of Sederunt, 1897, s. 14, is significantly indefinite, and there are doubts regarding the procedure to be adopted for making publication, and rendering a Court of Session deprivation effective.[9] The Act of Sederunt evidently contemplates that deprivation shall be pronounced in Lyon Court only, and provides an expeditious form for such process.[10] The Court of Session is no longer anxious to extend its jurisdiction, and should its jurisdiction be invoked, would conceivably follow the early examples[11] (where the Lords of Council did not themselves execute the deprivation) by requiring the Lord Lyon to pronounce a decree of deprivation, in manner prescribed in the Act of Sederunt, and to amend the roll of messengers, for which Lyon is exclusively responsible. Subsequent examples of that procedure arose. In 1582, when the Lord Lyon had himself dismissed a complaint against two messengers—these having been subsequently outlawed by the Privy Council—the Lord Lyon, on intimation of the sentence, forthwith passed a sentence of deprivation.[12] This same procedure was also followed in the case of *Howston*,[13] and it was the normal practice in the seventeenth and eighteenth centuries.[14] The statutes merely ordain that Lyon shall, in certain circumstances, take the advice or recommendation of the Lords, and it is significant that, even in the disordered state of the body of officers at these periods, neither statute contemplated or even alluded to any direct jurisdiction of the Privy Council or of the Court of Session over the officers-of-arms. They indeed confirm what appears from other contemporary sources, that the Lyon alone has jurisdiction.

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[1] *The Lyon* v. ——, 1666, Mor. 7648.

[2] *Grierson* v. *M'Ilroy*, 1668, Mor. 7651.

[3] *Heriots* v. *Fleming*, 1666, Mor. 7659.

[4] *Lord Lyon* v. *Copeland and M'Coll*, 1766, Mor. 7652; or upon complaint, *Lindsay* v. *Drummond*, 1744, Mor. 8889; *Clyne* v. *Murray*, 1831, 9 S. 338.

[5] *Monro* v. *Ross*, 1738, Mor. 8889; *Maclachlan* v. *Black*, 1821, 1 S. 206; C.A.S., A, ix. 14.

[6] *Monro* v. *Ross*, *supra*.

[7] *Lindsay* v. *Drummond*, *supra*.

[8] Mackay, Court of Session Practice, p. 233.

[9] Maclaren, Court of Session Practice, p. 1114.

[10] C.A.S., A, ix. 10, 11.

[11] *James Cowpar*, 1510, Pitcairn's Criminal Trials, i. *63.

[12] *Stewart* v. *Moncur and Gregg*, Privy Council, iii. 512.

[13] 1634, Privy Seal, 2nd Series, iv. 186.

[14] *Monro* v. *Ross*, *supra*.

1448. Executions made by messengers after their proper removal from office are null. But publication of the Lyon decree must have been made in the appropriate manner, now in accordance with the Act of Sederunt.[1] Formerly there had been some doubt as to what constituted sufficient publication.[2]

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[1] C.A.S., A, ix. 11.

[2] Bankton, iv. 6, 15; *Somerville* v. *Jarviswood*, 1608, Mor. 3091; *Lermont* v. *Lermont and Gordon*, 1699, Mor. 3096; *Hunter* v. *Montgomery*, 1732, Mor. 3097.

MESSIS SEMENTEM SEQUITUR.

See MAXIMS.

METALLIFEROUS MINES REGULATIONS.

See MINES AND MINERALS.

METHYLATED SPIRITS.

See EXCISE.

METUS.

See EXTORTION.

MID-SUPERIORITY.

See CHARTER (FEUDAL); SUPERIOR AND VASSAL.

MIDWIVES.

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PART I.—MIDWIVES.

SECTION 1.—CONTROL OF THE PROFESSION.

SUBSECTION (1).—*Restriction on Right to Practise.*

1449. The practice of the profession of midwife is regulated by the Midwives (Scotland) Act, 1915,[1] as amended by the Midwives and Maternity Homes (Scotland) Act, 1927.[2] No woman who is not certified under the Act may take the name of midwife, or any title implying that she is certified or is recognised by law as a midwife.[3] If any male person or woman not certified under the Act attends a woman in childbirth unless under the direction and personal supervision [4] of a duly qualified medical practitioner,[5] that person is liable to a fine, unless he proves that the attention was given in a case of sudden and urgent necessity, or in a case where reasonable efforts were made to obtain the services of a duly qualified medical practitioner [5] or a certified midwife.[6] There is an exception provided for in the case of a person attending as part of a midwifery course recognised by the General Medical Council or the Midwives Board for Scotland.

SUBSECTION (2).—*The Central Midwives Board.*

1450. The 1915 Act provides for the setting up of a Central Midwives Board for Scotland, which has the general control over midwives.[7] It is the duty of the Board to supervise the preparation and keeping of the roll of certified midwives,[1] and to frame rules to regulate the issue of certificates, the conditions of admission to the roll of midwives, the course of training, and the actual practice of midwives, and defining the emergencies in which a midwife must call in a registered medical practitioner to her assistance.[2] It must also arrange the examinations, publish annually the roll of certified midwives, and deal with discipline.[3] Any woman whose name is removed from the roll of midwives has a right of appeal to the Court of Session.[4]

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[1] 5 & 6 Geo. V. c. 91.

[2] 17 & 18 Geo. V. c. 17.

[3] 1915 Act, s. 1 (1).

[4] *Davis* v. *Morris*, [1923] 2 K.B. 508.

[5] *I.e.* a registered medical practitioner, Medical Act, 1858 (21 & 22 Vict. c. 90), s. 34.

[6] 1927 Act, s. 1.

[7] 1915 Act, s. 3. The powers conferred on the Lord President of the Council are now exercised by the Department of Health for Scotland (Scottish Board of Health Act, 1919 (9 & 10 Geo. V. c. 20), s. 4 (1) (*c*); Reorganisation of Offices (Scotland) Act, 1928 (18 & 19 Geo. V. c. 34), s. 1 (1)).

SUBSECTION (3).—*Local Authorities.*

1451. Local authorities exercise a general supervision over midwives, and are bound to investigate charges of misconduct and report to the Board, to suspend from practice any midwife where such suspension is necessary in order to prevent the spread of infection,[5] and to keep the Board informed of the midwives practising in the district.[6] Before commencing practice in a district a midwife must give notice to the local authority.[7]

SECTION 2.—PROVISION OF MIDWIVES BY LOCAL AUTHORITIES.

1452. The Notification of Births (Extension) Act, 1915,[8] gave power to local authorities, *i.e.* local authorities under the Public Health (Scotland) Act, 1897,[9] to make arrangements for attending to the health of expectant and nursing mothers.[10] By s. 5 of the Midwives and Maternity Homes (Scotland) Act, 1927,[11] it is provided that where in any district there are not in operation arrangements under the 1915 Act for such attention, the local authority shall, upon receiving reasonable notice, provide the services of a midwife or a duly qualified medical practitioner for the purpose of attending a woman in childbirth. The Act does not state by whom the notice is to be given, but presumably it is to be by the Department of Health. The local authority has power to recover the fee from the husband or guardian of the patient.

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[1] 1915 Act, ss. 14 and 15.

[2] See para. 1427, *infra.* The existing Rules were approved by the Scottish Board of Health for five years from 9th March 1928.

[3] 1915 Act, s. 5; 1927 Act, s. 6. As to the meaning of "misconduct" see *Stocks* v. *Central Midwives Board*, [1915] 3 K.B. 756.

[4] 1915 Act, s. 12. Rules have been issued in England to govern the procedure in such appeals under the English Act, but there is no Act of Sederunt.

[5] A midwife so suspended may be entitled to compensation, 1927 Act, s. 3 (1).

[6] 1915 Act, s. 16. These functions of town councils of small burghs are transferred to county councils. Local Government (Scotland) Act, 1929 (19 & 20 Geo. V. c. 25), s. 2 (1) (*b*), and First Schedule, Part I.

[7] 1915 Act, s. 18.

[8] 5 & 6 Geo. V. c. 64.

[9] 60 & 61 Vict. c. 38; Notification of Births Act, 1907 (7 Edw. VII. c. 40), s. 4 (3). These functions of town councils of small burghs are transferred to county councils. Local Government (Scotland) Act, 1929 (19 & 20 Geo. V. c. 25), s. 2 (1) (*b*), and First Schedule, Part I.

[10] Sec. 2 (1), as amended for Scotland by s. 3 (1) (*b*).

[11] 17 & 18 Geo. V. c. 17.

SECTION 3.—NEGLIGENCE.

1453. With regard to liability for negligence see NURSES. Sec. 22 of the 1915 Act provides that in certain cases, which are defined in the Rules, a midwife must call in to her assistance a registered medical practitioner. No penalty is expressly imposed for breach of this section, but failure to observe its provisions would probably found an action for damages for loss due to negligence.

PART II.—MATERNITY HOMES.

SECTION 1.—RESTRICTION ON RIGHT TO CARRY ON MATERNITY HOME.

1454. A maternity home means any premises used or intended to be used for the reception of pregnant women or of women immediately after childbirth, but does not include a hospital or other premises maintained or controlled by a Government department or local authority.[1] Any person who carries on a maternity home, unless registered in respect of that home, is liable to a fine not exceeding £50, and on a subsequent offence to imprisonment.[2]

SECTION 2.—REGISTRATION.

1455. Registration is obtained from the local supervising authority, *i.e.* the local authority,[3] and it may be refused if the applicant, the premises, or the equipment is unfit.[4] Such registration may be cancelled.[5] A person whose application for registration is refused or whose registration has been cancelled has a right of appeal to the Sheriff.[6]

SECTION 3.—RECORDS AND INSPECTION.

1456. The Department of Health has power to make regulations with respect to the records to be kept and the notification of deaths.[7] An officer duly authorised by the local supervising authority or by the Department of Health may enter and inspect premises which are used or which that officer has reasonable cause to believe to be used for the purposes of a maternity home and inspect the records.[8]

SECTION 4.—NEGLIGENCE.

See NURSES.

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[1] Midwives and Maternity Homes (Scotland) Act, 1927 (17 & 18 Geo. V. c. 17), s. 16 (1).

[2] *Ibid.*, s. 9 (1).

[3] *Ibid.*, s. 16 (2). See note 7 to para. 1426.

[4] *Ibid.*, s. 9 (2) and (3).

[5] *Ibid.*, s. 10.

[6] *Ibid.*, s. 11.

[7] *Ibid.*, s. 12. The Regulations are dated 24th November 1927, S.R. & O. 1927 $\left(\text{No. } \frac{1123}{\text{S. } 57}\right)$, p. 762.

[8] *Ibid.*, s. 13 (1). This subsection is ungrammatical. There is a redundant " to."

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